IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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* CA NO. 15-419-WES

MARKHAM CONCEPTS, INC., SUSAN GARRETSON, and LORRAINE MARKHAM, individually and in her capacity as Trustee of the Bill and Lorraine Markham Exemption Trust and the Lorraine Markham Family Trust

VS. — MAY 10, 2018

HASBRO, INC., REUBEN KLAMER, THOMAS FEIMAN, ROBERT MILLER, MAX CANDIOTTY, DAWN LINKLETTER GRIFFIN, SHARON LINKLETTER, MICHAEL LINKLETTER, LAURA LINKLETTER RICH, and DENNIS LINKLETTER

PROVIDENCE, RI
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BEFORE THE HONORABLE WILLIAM E. SMITH

CHIEF JUDGE

(BENCH TRIAL - VOLUME V)

APPEARANCES:

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10 MAY 2018 -- 10:00 A.M.

THE COURT: Good morning, everyone. We're here in the matter of Markham Concepts, Inc. v. Hasbro, Inc., et al, and we're here for closing arguments on the bench trial in this matter. Let's have counsel identify themselves for the record, and let's begin with the Plaintiffs.

MR. POLLARO: Robert Pollaro, Cadwalader Wickersham & Taft, here for the Markham parties.

MR. MOEHRINGER: John Moehringer, Cadwalader, Wickersham & Taft, Markham parties.

MR. COLE: Good morning, your Honor. David Cole, Cadwalader, Wickersham & Taft, here on behalf of the Markham parties.

MS. DUNN: Good morning, your Honor. Mary Dunn, local counsel on behalf of the Markham parties.

MR. KRUMHOLZ: Good morning, your Honor. Josh Krumholz from Holland & Knight on behalf of Hasbro.

MS. BATLINGER: Good morning, your Honor. Courtney Batliner from Holland & Knight on behalf of Hasbro.

MS. GLASER: Good morning, your Honor. Patricia Glaser for Ruben Klamer.

MS. VAN LOON: Good morning, your Honor. Erica van Loon from Glaser Weil for Mr. Klamer.

MR. RENNER: Good morning, your Honor. Eric Renner for Mr. Klamer.

MR. JINKINS: Good morning, your honor. David Jinkins on behalf of Linkletter and Atkins.

MS. BUSH: Good morning, your Honor. Christine Bush on behalf of the Atkins and the Linkletter Defendants.

MR. TURNER: Robert Turner on behalf of Hasbro, your Honor.

MS. FRAMROZE: Camille Framroze on behalf of Hasbro.

MR. GORACKE: And Mark Goracke on behalf of Hasbro.

THE COURT: Very good. Thank you all very much.

All right. So we have a lot to cover and a lot of folks who want to argue. I think there was an exchange of some e-mails about argument. Frankly I can't remember exactly what I said; I'm sure I gave you plenty of time, but so I think Plaintiffs will go first. And how much time did I give you?

MR. POLLARO: An hour-and-a-half.

THE COURT: Total, right?

MR. POLLARO: No. Two hours total. I think an hour-and-a-half initially.

THE COURT: You don't need to use it all, all

right?

MR. POLLARO: I appreciate that.

THE COURT: Okay.

All right. And you all are going to divide something like that among yourselves; right?

MR. KRUMHOLZ: Yes. What you said specifically or what Mr. Jackson said was an hour-and-a-half, and we would do an hour before lunch, we'd have a lunch break, we'd have another half hour to an hour, and they would have rebuttal up to a half hour.

THE COURT: All right. Well, let's try to keep it as concise as possible, okay?

All right. Mr. Pollaro.

MR. POLLARO: Thank you, your Honor. I have copies of the presentation for the Court.

THE COURT: Okay.

MR. POLLARO: May I approach?

THE COURT: You may.

(Pause)

THE COURT: I just want to take a moment so you all know we have a visitor today, Judge Paul Howard, who is sitting over there in the jury box. He's a federal district court judge in Australia, and he's visiting the United States for a period of about six months, was it?

JUDGE HOWARD: Three months.

THE COURT: Three months, working down at the federal judicial center in Washington and preparing some reports and recommendations regarding how the federal judiciary in Australia can work more effectively with its executive and legislative branches, and he's visiting us here in Rhode Island for a couple of days doing a variety of things, and we thought this would be a nice thing for him to observe. He's read your briefs, and he may have questions; who knows.

JUDGE HOWARD: Thank you.

THE COURT: So go ahead.

MR. POLLARO: Thank you, your Honor.

May it please the Court, the operative facts and events in this case occurred nearly 60 years ago, yet the record from that era remains largely intact, and that record uniformly identifies Bill Markham as the creator of the Game. To believe the evolving stories told by the Defendants at trial requires this Court to ignore the contemporaneous written record as well as the prior conduct of all the relevant participants in favor of these newfound revelations of three coordinated witnesses. In effect, what this case boils down to is what is more trustworthy: The written and

contemporaneous claims of the parties, or 60-year-old mustered recollections understandably schooled for the trial.

The Markham parties respectfully submit that the evidence shows that Bill Markham is the author of the Game, the work was not a work-for-hire, and that the Markham parties have established their entitlement to the right of termination to be exercised at their discretion.

The two most percipient witnesses in this case left no doubt about their representative understandings and intentions in this case, no doubt at all. In 1965 Ruben Klamer was erroneously identified as having designed The Game of Life in an industry periodical.

And your Honor, I believe I did not give you the exhibit binder that I have for you as well.

THE COURT: Okay. Pass it up if you have it.

(Pause)

MR. POLLARO: May I approach, your Honor.

THE COURT: Sure.

MR. POLLARO: We have copies for Defendants as well.

MR. KRUMHOLZ: Are these all admitted exhibits?

MR. POLLARO: I believe these are all admitted, although you'll notice they don't all have JTX numbers.

MR. KRUMHOLZ: Correct. Some were admitted that were not JTX.

MR. POLLARO: Your Honor, rather than having everybody leaf through their giant binders, we tried our best to make it easier for everyone.

THE COURT: Sure.

MR. POLLARO: So if you turn to Tab 25, I was in the process of telling you about an exchange that happened in 1965. We refer to this as the 1965 Exchange. And what happened in 1965 was very clear, and it's very important in this case because it is a snapshot of what the parties believed their representative roles and understandings were in this case. We don't have to go 58 years, 60 years and try to remember what happened. This is what happened. This is what the parties wrote clearly in the record, and this is what I would like to talk about.

So in 1965 Klamer was erroneously identified as having designed The Game of Life in an industry periodical. So if you turn to Tab 25, Toy & Hobby World from 1965, and on the very last page you'll see the very small print -- and we highlighted it, tried to make it easier for everybody -- that Ruben Klamer was identified as having designed The Game of Life. That was published in 1965. That was a big deal because

when Markham saw that he was furious. He immediately wrote to Ruben Klamer and demanded that he retract the statement. And if you turn to Tab 24 you'll see the first letter that Bill Markham wrote to Ruben Klamer to that effect.

So upon seeing that Ruben Klamer was publicly declaring that he designed the Game, Bill Markham called him out. And what did Klamer do? He complied, and he informed the publication, quote, "Be sure any publicity concerning me in your publication or anywhere else does not refer to The Game of Life." He didn't describe what his role is or he didn't describe the -- he said do not associate me with The Game of Life. That's what occurred in 1965.

Yet today, since Bill Markham has passed and he's not here to defend himself, we see examples like this. Copies of the game today bear the picture of Ruben Klamer on them, and what I'm holding right now, your Honor, is PTX270. And I'm happy to bring it up; I don't think there's any dispute that this game is in evidence. But it's a picture of Ruben Klamer and it's got a description of his contributions to the Game. In 1965 this wouldn't have stood, and it shouldn't stand today, even though Bill Markham is not here.

So what he's done since, he's enlisted help to

help finish his quest of minimizing Bill Markham. And as we'll discuss today, the facts as they've existed for the past 58 years show otherwise, and this Court should now allow his legacy to be destroyed.

No issues -- we don't believe there's any real issues regarding the outstanding issues that this Court needs to be resolved (sic). We categorized them as authorship, work-for-hire, and derivatives. There's a couple of subcomponents of that, but we'll talk about that. We talked about this at the last, at the end of the last hearing. It appears that the parties are all in agreement that your decision here will not immediately impact the status quo.

Turning to authorship, there's no apparent dispute among the parties with respect to the applicable law. The parties agree that the author is a person that creates --

THE COURT: I'm not sure I understand that last statement you made when you say my decision won't immediately impact the status quo. Could you -- exactly what do you mean?

MR. POLLARO: What I mean by that is Hasbro will continue to sell the game and the royalties will still continue to be paid, and basically your decision will impact the -- basically, you know, we view it as

leveling the playing field or rebalancing the negotiation decisions of the parties.

THE COURT: You mean it won't influence the status quo in terms of the ability to market the Game? Is that what you're saying?

MR. POLLARO: That is what I'm saying, because what we're talking about here is the right to prospectively seek termination. So your decision today -- and again, Defendants may have a slightly different take, but based on what we talked about last time at the hearing --

THE COURT: Would you put the microphone just a little closer to you.

MR. POLLARO: Sure. My apologies.

THE COURT: So what you're saying is it affects the rights, but nobody -- until somebody, assuming you win, until there's an exercise of that right to terminate the status quo is not affected. Is that what you're saying?

MR. POLLARO: That's exactly what I'm saying.

THE COURT: Okay.

MR. POLLARO: And again, that's how I interpreted what the Defendants said at the end of the last hearing, and we agree with that; and so to the extent they have any disagreement with that I'm sure

they'll let you know that.

THE COURT: All right.

MR. POLLARO: So turning to authorship. Again, no real dispute about what the law is here. It's pretty black letter law. The parties agree that the author has to be the person that actually creates in a tangible medium of expression the work at issue. The parties also agree that copyrights do not under any circumstances extend to ideas or concepts. As you would guess, the application of those seemingly straightforward requirements has led to significant dispute amongst the parties, and that's what we're here to talk about.

So where do we begin? So typically, in your typical situation the authorship analysis begins directly with, well, it's written on the registrations themselves. However, in this case all the parties agree that the registrations were wrong, and I cited portions of the brief there.

The registrations identify Milton Bradley as the claimant. They can't be the claimant. They have a license. So we know that's wrong. They've been identified as the author. We believe that's wrong because Bill Markham should be there.

And you can see there we know the registration

is wrong because Bill Markham had assigned his rights to Link, and Link should have been identified as the claimant. So where does that leave us? And your Honor, quite frankly, based on the cases, that happens fairly regularly.

THE COURT: That happens what?

MR. POLLARO: Fairly regularly. It's not an uncommon occurrence that the registrations are in fact incorrect.

THE COURT: So does it have any bearing? If both parties believe that the actual registration of the copyright is incorrect, I mean it seems like kind of an odd situation to me, frankly. There's no -- the original, it doesn't appear that the original was deposited with the copyright office. I think we agree on that; right?

MR. POLLARO: That's correct.

THE COURT: Or nobody can find it.

MR. POLLARO: Right. It was, but it was lost, which again is not an uncommon occurrence.

THE COURT: All right. So it's lost. If it was deposited, it was lost.

MR. POLLARO: Yes.

THE COURT: If it was deposited, it was deposited by Milton Bradley; is that right?

MR. POLLARO: That is correct. The publisher.

THE COURT: And the registration is to Milton Bradley.

MR. POLLARO: They filed the registration. Again, you know, there was some testimony about this, which is the common practice, because under the 1909 Act the publisher, you couldn't get copyrights under the old 1909 Act until the work was published. So I think everybody knows today, you know, as soon as you create a work, if you create a work or if I create a work it's copyrighted and we have rights automatically. That wasn't the case under the 1909 Act. There was some small exceptions for performances and things like that, but that's not what we're talking about.

So under the 1909 Act you had to publish, the publisher had to publish the work and then seek registration. And that's why all those cases from the 1909 Act, the *Kirby* cases, all those cases, the publishers were the ones filing the work because they're in charge of the publication and they have the resources and things like that. So, you know, in 99 percent of these case it's the publisher that's filing the registration.

THE COURT: So it's Milton Bradley that then

publishes the work when they market the game, then they register it, and it remains registered in Milton Bradley until today; right?

MR. POLLARO: There were renewals in 1988, or '88 or '89. I think it was --

THE COURT: I mean it's Hasbro now, but --

MR. POLLARO: Yes. And the registrations, quite frankly, changed. It's interesting your Honor brings that up because the registrations changed from the 1960 registrations to the renewal registrations, which is also an oddity. Link's name is not mentioned anywhere on any of those registrations in the renewals, so something changed that we don't know about.

THE COURT: Okay.

MR. POLLARO: You know, maybe they got --. But back to your Honor's question, which is a good one, does it matter? The short answer is no. In the situation where the registrations are challenged or potentially correct, all that does is give you the starting point of where the analysis begins. In other words what the evidence, what -- you know, where you start the analysis. And so I think your question is also a good one because ultimately your Honor is going to determine who should be the author on these registrations. It doesn't mean these registrations get

refiled or anything like that. You basically stop with your decision, so there's nothing that needs to be corrected or fixed or anything like that. So clear as mud, your Honor?

THE COURT: It just seems odd to me that, you know, a lot of things seem odd to me about this, but it does seem strange that the registrations are with entities that everybody seems to agree are incorrect and that that has existed for 60 years.

MR. POLLARO: Exactly. You're absolutely right, and obviously, you know, we lay out in our briefs why we think that's the case. I mean we were cut out of the conversations, and had we been part of the conversation we believe it would be different. Obviously they disagree with that. But that is certainly an excellent observation.

THE COURT: So where you are is that whoever is the appropriate owner of the copyright is not, it wasn't Milton Bradley, they're a licensee, and you were taking off from there.

MR. POLLARO: Yes, your Honor. I was basically trying to level-set the Court on where we should start this analysis. But again, back to your question, we could start with the registrations and we can say it says Milton Bradley, but, you know, it wouldn't change

the result. Ultimately the result would be the same. The evidence shows that they are not the author and therefore we continue it and have the decision from your Honor who the author is.

So I thought I would start at the assignment, but I didn't want to just start at the assignment because we put that in our briefs, and so I wanted to give you a little more context about how that assignment came to be, what was happening, why was that assignment entered into. And so, you know, there were a lot of facts that weren't in dispute. You know, there's no dispute that Ruben Klamer contacted Bill Markham in the summer of 1959. No issues there.

There is a dispute about whether or not Bill Markham had an undeveloped game at the time. Again, it doesn't change the analysis. We believe it's evidence that it makes the story make much more sense. Bill Markham was working on it; that's how it was able to be completed so quickly, and that's why he believes in part why -- and then it's borne out in the documents -- why like in the 1965 exchange why he is the inventor, the creator, the designer, and the developer of the Game.

THE COURT: Well, okay. So I thought this was actually a critical factual dispute from your client's

point of view because, if I understood it correctly, it's the so-called undeveloped game that gives rise to the spinner and to the circuitous path, and I thought your contention was that those were concepts that were in the undeveloped game.

MR. POLLARO: And they are, and that's spelled out in the Bill Markham deposition, but it is by no means critical. It is part of our story. It is just another piece of evidence in the last 58 years trying to go back -- if undeveloped, now we're going 60 years, we're going a little bit further back -- just evidence in the evidentiary record that Bill Markham is the one that does this.

THE COURT: Well, those are two things that, if they're true, make him an author at least of part of the game; right?

MR. POLLARO: Yes.

THE COURT: And then you contend there's more. You contend there's -- and I want you to explain this to me, something about the board, the bonding of the board or whatever it was.

MR. POLLARO: Absolutely. And I think those are excellent questions, your Honor. But ultimately our point is Bill Markham created this entire thing, and that's what the documents show, that's what the

testimony shows, that's what all the evidence up until probably about October 2017 when this new theory came into the case and --

THE COURT: But the testimony of Israel and Chambers was pretty clear that it was those two that were doing all of the work on creating the buildings and the overpasses and designing the cover of the box and the sketches. I mean I'm sure you're going to touch on all this evidence, but -- and they were very clear that Markham was never really in the room other than occasionally. It was the three people that were in the room when all that creative work was being done were Israel, Chambers, and Klamer.

MR. POLLARO: Exactly, your Honor, and, quite frankly, that is exactly it in a nutshell because that is completely 180-degrees different than the evidence up until this new defense in the case.

And in fact, as your Honor is well aware, all three of those parties submitted declarations in this case, in this very case in December of 2015 and January of 2016, and none of them said that. In fact, Ruben Klamer in that declaration, and I can't remember if it was January 6, 2015 or '16, referred to it as the Markham prototype. I mean their story changed overnight. Leonard's and Grace's declaration in this

case said nothing that they testified to at trial. They said nothing at the deposition that I took of them in the summer of 2017. The story they told you was simply nowhere else. It's nothing but a story, and that's ultimately what I intend to talk about today.

THE COURT: Okay. Well, have at it. I'll try not to throw you off here. Go ahead, tell me why I shouldn't believe it, I guess.

MR. POLLARO: So there's no dispute that the Game was completed and shown to Milton Bradley at Chasen's restaurant in Hollywood, California, in the week of August 10th. Milton Bradley loved it. No issues there.

So this is where it gets interesting. So again, going back to kind of what I was attempting to do, I'm trying to give you some context about why this signed agreement happened. So they had the fancy dinner, lunch, whatever you call it. Milton Bradley said they'll take it. And what happens? Ruben Klamer takes the prototype and he immediately walks it over to his attorney, and the attorney writes a letter. We all know the letter. It says the Game is proper copyright subject matter. So we know that letter, that occurred on August 14th, 1959.

The problem is he didn't tell Bill Markham about

that. Bill Markham had no idea that his prototype had been determined to be copyrightable. So what happens next? Klamer sends the Game to Milton Bradley on August 19, 1959. We talked about that at length. That is the letter where Ruben Klamer misrepresented that he had an exclusive contract. I'm sure the Court is well aware of that. But with that letter were certain attachments, one of which was the Game and one of which was this opinion of counsel that showed that Bill Markham's prototype was copyrightable.

So again, all this is kind of happening fast, all really fast. Milton Bradley wants to come out with a game for their hundred year anniversary. So what happens? Unbeknownst to Markham, Ruben Klamer enters into a license agreement with Milton Bradley, and we've seen that. When Markham found out about this, he was livid. He was absolutely beside himself. And as evidenced in his deposition testimony from 1999, he almost walked away. He was going to take his game and walk away. And so what happened? And actually I don't believe that's in dispute because Ruben Klamer testified about that at trial as well.

So what happens? The parties negotiate the assignment agreement. They negotiate an assignment agreement. It goes back and forth. We know there were

multiple versions. It wasn't a take-it-or-leave-it, it wasn't anything like that. It went back and forth, and they negotiated the terms of this agreement.

And Klamer needed Markham's rights. There's no dispute there. Later, in the 1989 litigation, he describes Bill Markham's rights as imperative. So here's the agreement, and that is kind of the backdrop. That's where we are. And so this is the negotiated agreement that came up. So you've seen the language before, so I'm not going to focus on it. I'm not going to reread it for you. Obviously "At the request of Link" portion, we'll deal with that in the work-for-hire issue.

So there's no question that Ruben Klamer is saying here at my request Markham invented, designed, and developed the game. So Bill Markham invented, excuse me, designed, and developed the game. That's what this agreement said.

Now, with respect to all the intellectual property, you can see it there: Upon the request of Link, Markham will pursue any copyrights, any trademarks, any patent applications anywhere that he is entitled to as the inventor, designer, and developer. No question about who the designer and developer and inventor of this game is. And interestingly, at the

time this agreement was signed the Game was copyrightable, but Bill Markham didn't know it.

Now, while Klamer referred to Markham's rights as imperative, what's also important -- consistent with your questions before -- if he was in the room and he knew exactly what Leonard and Grace were working on, he would have sought their rights as well. He didn't. He sought Bill Markham's rights. And that's why this is a piece of evidence that as we'll go through this you'll see that this is just a story that came up in October of 2017 when they realized that their work-for-hire defenses were not working out so well.

THE COURT: Doesn't that assume that he has a fairly sophisticated understanding of copyright law when you say he would have, should have and would have sought the assignments from Chambers and Israel?

MR. POLLARO: I wouldn't say sophisticated. Obviously, you know, there's no secret Ruben Klamer has hired many lawyers throughout his time, and we'll talk about some of those that he hired subsequently. But given the fact that he had a conversation certainly with his patent attorney or copyright attorney or intellectual property attorney, whatever it is, you know, on August 14th, 1959, there's certainly a certain level of understanding that Mr. Klamer has. He

certainly knew enough to take it to an IP attorney in 1959.

THE COURT: So is what you're arguing -- I just want to be clear about the point you're making here. Are you saying that because Klamer did not seek an assignment from Israel and Chambers in 1959, that that suggests, that implies that the testimony of Israel and Chambers in 2017 is incorrect?

MR. POLLARO: I am, your Honor.

THE COURT: And you're saying that's evidence of that fact because had it been -- if what Israel and Chambers said was actually true, Klamer would have sought an assignment from them; he would have known enough to do that?

MR. POLLARO: Absolutely. And your Honor, going back to your point, I want to reach on my desk real quick because I have a case directly on this point.

THE COURT: Sure.

(Pause)

MR. POLLARO: I am reading, your Honor, from the District Court opinion in *Picture Music*, it is 314 F.Supp. 640, and I'm reading from page 653, and I'll just read it just because it goes exactly to the question you just asked, your Honor. "Both Disney and Berlin were sensitive and sophisticated on the need to

procure an assignment of copyright interest before proceeding with publication except where no factual situation existed for a claim of retained ownership or an interest therein, by a writer, adapter or arranger."

So, your Honor, he knew enough to get an assignment agreement from Bill Markham. If he was in the room over their shoulder after just having talked to his patent attorney, he would have done the same thing with Leonard and Grace.

THE COURT: Okay.

MR. POLLARO: Again, so just to kind of keep it in perspective, I'm going to march you through the 58 years of the highlights of where their story falls apart, where their broad pronouncements have no support and are nothing but a story that was told by -- you know, I'm sure the Court is aware they're all represented by the same counsel and they've all been represented by the same counsel since 2015.

So we call these the "Credit Letters." Shortly before the assignment was signed, Link asked Milton Bradley to display the name of Markham on the box as the game's designer. So in other words Ruben Klamer sent a letter to Milton Bradley and said Hey, listen, can you put Bill Markham's name on the box. Milton Bradley unfortunately had a company policy that

they couldn't do that, they said it was confusing so they didn't do that, but not because they didn't think Bill Markham was the designer. So, but I mention that again; another situation, Ruben Klamer purportedly in the room, one of the two most percipient witnesses in this case, didn't say can you put Bill Markham's, Leonard Israel's, and Grace Falco's name on the box. He said Bill Markham.

So "Manufacturing Suggestions." Again, we talked about the importance. I mean the authorship, you have to create, you have to actually fix the work into a medium. So what happens here is Bill Markham is being asked to provide Milton Bradley -- Milton Bradley obviously, you know, there's no dispute; they liked the prototype, they loved it, they wanted to mass produce it. So in that process they reached out to, well, I'll save this for later, but they reach out to Klamer because Klamer had misrepresented that he had an exclusive contract with Bill Markham. He had expressly told Milton Bradley if you have any issues you contact me directly, do not contact Bill Markham; everything needs to go through Link. And we have that evidence in the record where that distance was being created over and over and over again.

So what we see here is Markham was asked to

prepare suggestions for how the Game might be manufactured. Again, understand this is September now, 1959, and things are happening quickly. Milton Bradley originally wanted the Game on the market by January. That obviously didn't happen. But things were happening quick, and so they said Bill, you made this game; what can you do for us? What can you help us out with?

And Bill being, you know -- and he testified to this in 1989 -- a genuine guy said, Listen, I don't understand their process. I can tell you what I did, and I can just tell you what I did; maybe it's helpful, maybe it's not, I have no idea. And so what he did is he put together an entire sheet, you know, a couple pages of manufacturing suggestions that went to Milton Bradley through Link, and they were step-by-step of what he did from all the way from plastics and how you can make these things efficiently, or how he made them efficiently, and the molding and things like that, all the -- as Mr. Orbanes testified, those are the things that the creators do. Finding is one of those things. That's what creators do. You need to understand how not only to create it and what to create, but how to put it all together.

And so ultimately to your question, your Honor,

you know, that's how we view the testimony that occurred in LA. It was nothing but the preliminary models, routine tasks that Bill Markham gave to these staff attorneys -- sorry -- staff artists. I'm around too many attorneys recently.

But there's no evidence that they did anything but routine. They submitted a declaration, and I would encourage the Court0, if I can find the cite I'll provide it -- but the declarations that were provided by these very witnesses in this case before this defense came in are stark and they read nothing like this testimony. And so ultimately what you see is they were doing nothing but the routine tasks.

And I don't think I mentioned it, but the names Leonard Israel and Grace Falco do not appear anywhere, anywhere in the contemporaneous record. There was one passing reference to them on the invoice that says six weeks staff artists, is the only reference to these two individuals in the record. That's it. And you'll here later about the timing of the invoice. The invoice was October 12th. They haven't even established -- we haven't even seen any evidence at all that they worked on the actual prototype. There were copies made. They couldn't tell the Court, they couldn't tell us if they worked on the prototype or the copy because they didn't

know. They didn't know they were copies, they didn't know, so it's quite -- we have no idea, and it's speculation. And so what the documents show is Bill Markham did this.

So "Correspondence," I pulled these out, and again, I'm mindful of the Court's time so there are remarkably a lot of documents that exist from this time frame, but I'm pulling out the ones that I think encapsulate the point we're trying to make, which is everybody thought Bill Markham was the inventor. The most knowledgeable people in this area, including Ruben Klamer, said repeatedly Bill Markham created it.

So the top layer there I had was Milton Bradley understood it. And again, you know, it kind of -- I put in "short note" there because Milton Bradley was told not to communicate with Markham, so he puts a short note and what you see is very short notes to Bill Markham cc'd to Ruben Klamer to make sure there was no issue; and they're not substantive.

All substantive communications go through Ruben Klamer and Milton Bradley, not cc'd to Bill Markham. That's a pattern. And he says there you have done a wonderful job; another piece of evidence. Milton Bradley understands it was Bill Markham. Milton Bradley understood that there was nobody else involved.

THE COURT: But all Milton Bradley knows is based on their very limited information that either what they've been told or what they read in letters during that time and what they saw at Chasen's restaurant during the presentation; right? I mean no one from Milton -- there's no evidence that anyone from Milton Bradley was ever in the workshop or ever kind of watching what was going on or talking to anybody about who is actually doing the work. If they saw documents that said Markham created it, or if they went to a meeting and Markham presents it and says I did it, then I mean that's what they know.

MR. POLLARO: Exactly, your Honor, and that's exactly the point. They were in meetings with Ruben Klamer, and Ruben Klamer was telling them Bill Markham did it. Didn't say Leonard Israel, didn't say Grace Falco. He didn't say "your team," he didn't say "you and your posse," whatever he might have said. He said "you." That's the point. That's what he was being told, and that's the consistent story for 58 years that was being told until this case.

So, and this next letter is one of my favorites, actually. It's now we're not between Milton Bradley and Markham, or Link and Markham, we're between Milton Bradley and Link. So this is a completely unconnected

conversation that doesn't involve Bill Markham, but it's about Bill Markham, but he's not cc'd. Again, the pattern is he's been cut out. So what does it say? It says, you know, it's not a very exciting letter, but it says, "In reply to Link's letter of July 19th on the subject of the Life game of Bill Markham;" okay? That came from Link to Milton Bradley. Those two parties understood it was Bill Markham's game.

And again, the last point there, "The idea that you created through Bill Markham is really quite exceptional," is completely consistent with our theory. Completely consistent with the facts. Ruben Klamer told Milton Bradley that he had an exclusive contract with Milton Bradley -- sorry -- with Bill Markham. And as he testified at trial rather emphatically, Milton Bradley always took him at his word. So that's what happened.

So the "1965 Exchange." Again, there are lots of other issues in here, so again I'm not going to go through it. I think you understand the general concept there, but it's important because when we first started this in the kind of opening of the opening, there was a reference to a letter to a trade publication. Well, there was also a description from Ruben Klamer to Bill Markham what his contributions were to the Game.

So basically just to kind of back up a little bit, Bill Markham sees the Toy & Hobby World page 17. He sees that Ruben Klamer has been designated as the designer of the Game, the designer of the Game. Can you imagine what Bill Markham would do if he saw Ruben Klamer's face on the box? He probably would have had a coronary.

So what happened was when he wrote that letter and he said Listen, you got to fix this, you have to fix this, this is not okay. And Ruben Klamer said I'll fix it, I'll fix it. And he did fix it. So he wrote a letter to the publication and said by the way -- he didn't say by the way please describe me this way. He said don't associate me with The Game of Life at all. In other words, he's acquiescing to what Bill Markham and his party --. These were the two most knowledgeable witnesses in this case, and this is what their understanding is.

And so but I do want to point out that what Ruben Klamer said was he described his own contributions, and that's what we referred to earlier. He said Listen, don't forget, I'm the one that told you about The Checkered Game of Life and said wouldn't it be a great idea to update it. That was it. That was it.

And the last part there is, again, in the letter Markham is very clear: I'm the inventor, I'm the designer, I'm the developer; this is me. It's not you; you need to fix this. Klamer acquiesced, and in doing so -- and now I'm talking about the middle of the letter from Klamer, from Klamer to Markham. He said it's you, it's all you; it's you did a good job, you came up with a top-notch product. You, at my request -- and he loves to throw in that language, and we'll deal with that in the work-for-hire. You, at my request, were the inventor, designer, developer, you, Bill Markham. And again, he didn't say come on, Bill, it could have been -- I know, you and I know Leonard did it, you and I know Grace did it. He didn't say that. He said "you." And as he told you, your Honor, he was there. He says he was there. Okay. We'll have some dispute about that, but he says he was there. So he knows purportedly who did what, and he didn't say in this letter come on, Bill, pipe down, it was Leonard and Grace that did it for you. He didn't say that. He said you, you, Bill Markham.

And that's what this, this evidence, this 58 years will say, the exact same thing. And quite frankly it gets better; the story gets a little better, your Honor. If it's dragging along I'll speed it up.

So now we're in "1997." So what do we have? Bill Markham passed. Bill Markham passed I think in 1992. So we have a letter written from Ruben Klamer to Mr. Hassenfeld, and I think by this point it might even be Hasbro, and he says Listen, this is what happened in 1997; Bill Markham reduced my ideas to practice in concrete form of a three-dimensional prototype. That's creation. Bill Markham did this. Not anybody else; not Leonard Israel, not Grace Chambers. Bill Markham. This is 1997. This is Ruben Klamer telling it like it is.

I put it there, won't spend a lot of time on it. Ironically, like in 1965, Ruben Klamer was a little hurt that he wasn't getting credit for being associated with The Game of Life, so clearly things had changed since Bill Markham had passed. So once Bill Markham had passed, Ruben Klamer had nobody that was going to call him out and was willing and able to tell everybody in the industry what his role was and to minimize Bill Markham and which, again, is why his picture is on the box.

So, okay, "1989 Litigation." So I guess I put that out of order. Obviously we've talked about that before. That was a dispute primarily related to international royalties. Both of the parties were

deposed. Ruben Klamer repeatedly testified during his deposition that Markham, again that same language -- and quite frankly that might be where the language from the '97 came from -- reduced to concrete form the high level concepts and ideas, the creator, Bill Markham, in 1989 said Bill Markham. Again, another opportunity under oath to say it could have been somebody else, but didn't. Said Bill Markham. And that was the litigation, your Honor, where Ruben Klamer identified as imperative Bill Markham's rights; no one else's, Bill Markham.

So now I've kind of already touched on this, but so in the "Current Litigation," it's quite remarkable. In this case these witnesses have submitted declarations that sound nothing like what their testimony was. And again Ruben Klamer on January 16 in this case, "Mr. Markham produced a prototype." Do you think he would say that today? I doubt it. He didn't. He's saying the opposite. He's saying Markham didn't do anything. He is now an absentee employer. That's what this new thing is.

THE COURT: Well, I've been waiting to sort of ask you this, but the simple sort of reconciliation of all this business is that, you know, Markham was very aggressive about claiming credit during his active

years, it was very important to his business reputation, and he was very pushy about that and Klamer accommodated him and that resulted in all these documents that you've cited. And in his declaration I think he -- you know, everybody's testimony seems to be, the basics of it are Klamer goes to Milton Bradley, looks in the archives, he sees The Checkered Game of Life, he gets an inspiration, he sketches a bunch of things out, he says himself I'm not a toy designer, I don't know how to build models and things like that; I got this partnership with Markham, he's got a company, he's got people who work for him who are actually artists and actually went to art school and do that sort of thing. He hires Markham's company to do the prototype, and the prototype gets built in the workshop. I mean, it's like any other company; Markham's the boss, he's got Chambers and Falco working, Israel and Chambers or Falco, whatever we call her, working for him; and they do the grunt work, he's the boss, and ultimately a prototype is built and it's presented, you know, they present it and it's successful.

I mean all of that is not really inconsistent with the documents that you've put forward, and it's not really inconsistent with the testimony that's been

presented. The thing that makes all these things arguably inconsistent is if you have to have one person who did it, and it looks to me like there were a lot more than one person involved in creating this prototype.

MR. POLLARO: Your Honor, I appreciate the point. I think it's a great question. But it is inconsistent because -- and we'll get into some of the inconsistencies of the testimony. For example, in LA, as you may recall, in 1989 Ruben Klamer said he did not have firsthand knowledge of who worked on the prototype. He didn't know. He had to be told. He was told. Did Leonard Israel work on it? Bill Markham told me that he did. He had no firsthand knowledge. He wasn't there. That's not what happened. There are so many inconsistencies in this story, and we've poured them out in our brief, and I don't want to be --

THE COURT: Well, I don't really understand then why would Israel and Chambers fabricate that?

MR. POLLARO: Ultimately what I'm trying to do is --

THE COURT: They don't have a stake in this. They're not getting anything out of it.

MR. POLLARO: We don't know that. I absolutely don't know that. There are certainly, you know --

THE COURT: There's no documents that say they have any arrangement with anyone to get anything out of this, and there's no testimony that says that. There's no evidence to suggest that they have a stake in the outcome of this.

MR. POLLARO: Your Honor, I believe I asked Chambers, and it's the first time and I hope the last time, I'm pretty sure she objected to my question -- she, the witness. When I was asking her questions like that she objected to my questions at least a dozen times, so I don't know, I just don't know. It never went anywhere from that.

But it is inconsistent, but, your Honor, I want to put it in perspective because what you see here is a lot of work on routine aspects. You know, Bill Markham, when he testified -- and again, it wasn't the crux of that case. It was listen, this is what I was working on. Nobody had done that before. They didn't talk about -- it worked like clockwork, according to Leonard and Grace; right? You didn't hear about, oh, my God, there's no part, I don't have this material, I've never done this; how high are the mountains? Where do the mountains go? How does this fold work? None of that, because it had already been done. And they literally were doing routine things. They didn't

talk at all about Hey, listen, you know, it was a real bugaboo about this mountain and fold. Nothing.

So what they testified, and I think it's clearer in Israel's testimony, is I did thumbnails and then I was out; I don't know what happened. And that's the big, you know, that's the big -- okay, who created the final box? Well, you did the thumbnails, the tiny thumbnails that you thought might work. What happened at that? Grace did it. Ask Grace: What happened? You know, you did the final box. Leonard did it. That's exactly what they did. They worked on preliminary, draft, routine things. That's it.

Bill Markham is the only one in this case that has the knowledge, the skill, the training, and the evidence. That's the only person that can be the author of this thing.

And just one last point, your Honor. I don't mean to cut you off. That's what Leonard Israel testified at his deposition. That's what he said: I did routine tasks for Bill Markham. Routine, that's his word.

THE COURT: Well, the evidence, that unless you read it into the record as prior inconsistent testimony, which you may have, but I mean just so we're clear, the evidence of their testimony is what they

testified to in court; --

MR. POLLARO: Yes.

THE COURT: -- right?

Okay. So what is the evidence that Markham himself actually did any of these things other than the sort of negative inferences that you're asking me to draw from sort of the gaps and the positive inferences from the documents? Is there any other evidence? So for example, I don't recall, and maybe it's there and I just don't recall it, but for example -- well, let's start with this. What is Markham's skill and training for making boxes and molding mountains and all that kind of stuff?

MR. POLLARO: That's an excellent question, and that actually supports the fact that Markham would do that. Unfortunately there's no documents, there's no, you know, one thing that says this is Bill Markham's CV. There's nothing of that. But that's exactly what he did. He went to Hong Kong all the time to work out new molds and figure out what to do. I mean that's who Bill Markham was. That's what he was doing. And that's why -- I mean, you know, there's a little bit of testimony about, a little bit of evidence about some of the other things that he was creating, dolls and other things like that.

And unfortunately the Markham parties are at a little bit of a disadvantage because Bill Markham is no longer here.

THE COURT: Okay. Why don't you keep going.

MR. POLLARO: Thank you, your Honor.

So I've alluded to this and so I won't spend a lot of time on it, but everything changed in October of last year. Obviously your Honor would know much better than I do, but in my experience on the eve of trial a knew theory that becomes a focus is generally an indictment on the other theories in the case. And again, what we're talking about here is unsupported sweeping pronouncements without any documents, with no documents. I mean they're asking your Honor to elevate Leonard and Grace as authors when their names are not even in the record. And in fact, if I remember correctly Grace testified that The Game of Life was not on her resume. It was that unimportant. And along those lines, that's also part of the story.

They testified in LA that they knew what the arrangement was with Ruben Klamer, Milton Bradley and Art Linkletter, whatever the parties were, and they knew it was roughly a third, a third, a third. They didn't see contracts, but Grace Chambers testified in LA that she knew what that was, and she testified that

Leonard knew what that was. And you know what? They didn't say anything. They didn't say anything for 58 years. They never said why does Bill Markham keep getting a royalty? Why does everybody think Bill Markham did this? Never, never said that. And that's, again, just another piece and it just puts a perspective to the story they're trying to sell you right now. It doesn't add up.

So the good news is I think we've touched on a lot of this so we can probably go relatively quickly here. What I was attempting to do here was say listen, the universe of people that we're talking about is small, it's five people; they're listed there.

And Klamer, I'm curious to see what they have to say. As far as we're concerned, he cannot be an author. I mean adamant, I didn't create anything; I'm out. So we'll see what they have to say.

Sue Markham is similar, similar. You know, people like to throw her name out; yeah, she was the one typing up the rules; she was the scrivener; she was the one that had the typing skills; she was the one that could put the rules down on paper. And there's plenty of evidence where Bill Markham referred to her as his secretary. That's what she was. She was a very important secretary, but that's what she was doing.

No evidence that she did anything substantive, and that is just mere speculation; again, inconsistent with the 58 years of record evidence.

So I'll go over these relatively quickly. Chambers said nothing on the cover, nothing at all on the cover. And then what Israel testified about was, yeah, I did sketches, that's it, and then I was out. He testified very clearly: I didn't do the final cover; I have no idea; I don't know the size, don't know how it looked; nothing. The testimony is not reliable because, I refer to it, they each pointed to each other when the question came up, Who did it? Where did it go from there? They each obviously, for whatever reason, pointed at each other. Nobody is left.

Bill Markham. Bill Markham is the one that did. Bill Markham is the one that testified -- and I'll skip over those. Those are just the cites of the testimony. And obviously if I put it in red it's super important.

So here, Bill Markham's testimony. He was testifying about the things that you expect somebody who did this, like yeah, you know, it was a pain in the butt; I had to make the top of the board an inch shorter so you could see all the accoutrements, the pieces in the game; right? These are the things you

would expect somebody that created it to testify about, and that's what he did. None of that came out in LA.

Similar thing on the gameboard, and I tried to do this in, you know, kind of a summary fashion to not get bogged down, so I'll just go relatively quickly. Israel -- again, similar thing. Israel didn't work on the gameboard. Chambers says she worked on the gameboard. You know, obviously from her declaration to her deposition, you know, she certainly wasn't in charge of it at that point. The most I got out of her was she worked on balsa wood buildings, and then at trial becomes the mastermind or the purported manager of that thing. And so again, the gameboard doesn't add up. And then the specifics, too. There's no testimony at all from the witnesses about creation of the spinner. They say, yeah, it's Bill's thing; they wanted it noisy. You know, they just avoid it, they just avoid it, the track, things like that.

Bill Markham created the gameboard and all the component parts. And I'll jump to the -- yeah, Markham testified in his deposition that was in my board, already had that.

Again, putting it in perspective, it's this idea that they were doing the routine tasks. They were staff artists. They were -- I can't recall the dates

right offhand, but I'm pretty sure they were a year or two in. They were really junior, very junior. And so I think it was Mr. Israel's first job and I think, I think it might have been Grace Chambers' first job as well. These guys were doing routine tasks at the direction of Bill Markham. And again, you know, they haven't shown that he was working on prototype. We just don't know. We just don't know.

Now, the creation, okay, so a lot of talk about binding. Binding is important. Binding is how the game came together. And there's no dispute it's a three-piece board and it's got multiple parts and things like that, and all those things had to work. But it's interesting because, you know, when we asked Grace about it she had no idea, no idea; you know, looked at the invoice and said yeah, it's on here, we must have done it. We must have done it. "We" is Bill; because Leonard hadn't done it, and Sue wasn't in that business. So again, you know, there's some argument in the Defendant's papers that we're saying that's (unintelligible) arguable. Absolutely not. Absolutely not. We're saying that's evidence that Bill Markham is the one that's creating. He's the one that's creating.

And so it's interesting Mr. Orbanes testified

that that's exactly what you would expect about binding. He knew what binding was. He said yeah, I would expect somebody who did binding to be the creator -- sorry -- a creator to understand binding. That's the way he said it.

So the gameboard summary, you know, meant to just kind of knock out the parties? It's Bill Markham. Bill Markham is the creator. And the rules, similar thing; you know, they try to throw it out there that Sue Markham did this so there's simply no credible evidence or no evidence at all that Bill Markham did -- or, I'm sorry, that Sue Markham did.

And so then underlying all of this is this inconsistent testimony. So in 1989, excuse me, as we talked about in LA, Ruben Klamer said I didn't have direct knowledge of those, of who was working on it; I was told by Bill Markham that Leonard Israel and Grace Falco worked on it.

Fast-forward to this case. He's apparently hovering over Grace Chambers and Leonard Israel knowing everything they did. And so this is the big problem with the new story, is if the Court believes that Ruben Klamer was in that room twice a week hovering over Leonard and Grace, then in 58 years he didn't mention their name. He didn't mention their name. He said

Bill Markham, okay? And so if he wasn't in that room and he didn't know what happened, and Grace and Leonard did that, did the work, then they misrepresented that he was there twice a week. Somebody is getting thrown under the bus, which it's either Mr. Klamer or it's Leonard and Grace. Those stories cannot reconcile. And so that's the point of this slide.

So to kind of summarize the authorship, you know, we have a remarkable record from the contemporaneous time that says Bill Markham is the creator, designer, developer, inventor, the maker, the reduction of practice, whatever term you want to use, for almost 60 years without exception, and even in this case. And the story they're selling right now is inconsistent, and it's mere speculation about what it was.

But interesting, we don't need to speculate about how it was created because we know. We know when the Game was completed, and that was at Chasen's in the week of August 10th, 1959.

So their story doesn't add up; mere speculation. Our story, 58 years of record. And you know what? We even have that pinnacle moment when Bill Markham testifies, and Ruben Klamer as well, Bill Markham put the track on the board, glued it down for the first

time, the first time that game was complete. Bill Markham --

THE COURT: So I'm glad you brought that up because I wanted to ask you about that. So is that the critical moment? Let's say that Leonard and Grace worked on various components, you know, the houses, getting the spinner to make noise, whatever. They did various things. But they also testified that a lot of the pieces had to go out to be molded. I think they said it went to the plastic company or whatever.

MR. POLLARO: Exactly. What I interpreted their testimony, they didn't know. They were just doing kind of their routine tasks and they didn't know, and then obviously we showed them the invoices that showed plastics and things like that; so yeah, that's where that came from.

THE COURT: So there's all this work kind of going on and sketches and maybe models, little parts of it, but there is this testimony from Markham that it was all put together there at Chasen's when the track was put on the board and everything was put into place.

So you seem to be saying that's when the prototype was actually complete and that was the first time it was complete, that it was a bunch of components up to that point, --

MR. POLLARO: Absolutely.

THE COURT: -- and that's when it's complete and it was Markham that presented it. Right?

MR. POLLARO: Correct.

THE COURT: Okay. So I guess what I'm trying to get to is, you know, there is this theory of joint authorship out there, and is it sort of critical when it finally comes together as a prototype, is that some great event in terms of its copyrightability versus when lots of the pieces are being made that come together?

MR. POLLARO: It can be. But yes, yes, the short answer is yes. And so with respect to I think you're referring to the joint authorship argument of Klamer. And so the first element of that -- by the way, everybody always kind of skips to the second part about that, but the first element is that the parties intended for the work to be a joint work, and so clearly that prong, I mean the 1965 Exchange would bear that, would shoot that down immediately. There has to be an intent to be joint authors.

But even the joint authors, they have to do the creation of the final thing, and so just doing routine components isn't enough.

THE COURT: Okay.

MR. POLLARO: So now I'm going to move on to this statutorily-protected work. So the Defendants argue that it is unknown what was deposited in the copyright office. I mean quite frankly, your Honor, I'm a little bit surprised that we're arguing that. That's simply not the case. It's irrelevant which version of the Game bearing a 1960 copyright date was deposited. It simply doesn't matter; for copyright purposes they are all the same, copyrightably indistinct, and Mr. Orbanes testified to that. Hasbro's corporate witness knows that. If it's got the same date, it's the same game for copyright purposes, so any changes, any distinctions, there are none for copyright purposes.

And this idea, and I'll just mention it briefly, I'm terrible with analogies but the The Sword and the Shield, the way I understand Hasbro's argument is if it's unknowable what was in the copyright office, they could never pursue an infringement claim against anybody; and I know that's not what they're arguing because there's only three registrations to the game. So it just kind of puts it into perspective that that's not what the law says.

As we just marched through, Bill Markham is the creator of this game, and the work that was deposited

was a copy of Bill Markham's prototype. That's what happened. They took his game and copied it for commercialization, and that's what you have.

Did they make economic or changes? Yeah, they made some changes. And you know what happened? That happens in every single case, every single case. There's no situation where you can go from the prototype to the commercial mass market without some changes. Both experts said that. I don't think anybody disagrees with that. But that's the whole point; the changes can't be trivial. The cases say they can't. Yes, there's a low bar, but they can't be trivial. You can't lower mountains. There's cases that say you can't take something seven inches and make it five and expect that to be copyrightable. It's not. It's different. It's a change, yeah, it's noticeable, but that's not what the law is. And it's not the intent of the parties.

Bill Markham created this game, always held himself out to be the inventor, the designer, developer. That's what this summary is.

And then this whole idea about aesthetics. Again, attorney argument; no evidence of that whatsoever. That showed up for the first time. Again, going back to the Ruben Klamer declarations, he in very

detailed fashion tells what the economic changes were; they were, you know, I took the 3-D mountains or I suggested the 3-D bridge come down and I printed the thing. He had, you know, three or four suggestions that he provided. No mention of aesthetics. No mention of spinner. It's just remarkable how different those declarations are from what we heard in LA.

And just another example is what Mr. Orbanes was testifying to. The substance of Mr. Orbanes' testimony was yes, I see differences and as someone in the industry those are aesthetic changes and that's why you do them, because we know men like ovals, or I forget the exact situation. I think Bill Markham had put a diamond on there or something like that, and Orbanes, in his training in the industry says, you know what, ovals are more pleasant to both sexes so we want to put an oval there.

Those are exactly the rote, common, uncreative things. Every change that he talked about, he said they're all aesthetic. But you know what? When I asked him if they were all based on any particular individual at Milton Bradley, which has never been identified, any particular thing about Milton Bradley why that would be done? He said no, I know that because I'm in the industry. In one he even told me he

knew that since college. He was taught that in college.

That's exactly the point. And he said everybody knows, if you look at rules and you got certain things in the back, you move that up front, whatever that scenario was. All plug-and-play, all not creative. That's what Mr. Orbanes testified about, and that's happened.

And your Honor, I apologize, I didn't bring the prototype of the Game, but I think you get the point that this was a very well-developed prototype. I mean I appreciate Mr. Klamer's age, and so I'm kind of half joking but, you know, he doesn't tell the difference. Twice he told me that it was the commercial version of the Game. You know, he's the one that knows the most. It is a spitting image, and there's evidence in the record, it is a faithful interpretation of Bill Markham's prototype.

I just want to point out the case I mentioned about moving the seven inches to five inches. This is that *Batlin* case, which is 536 F.2d 486. It says they can't be trivial; the changes have to be meaningful and creative.

THE COURT: You've got about 15 minutes left.

MR. POLLARO: I will speed it up.

All right. Work-for-hire, you know, that's their defense. We think it's their issue; we'll let them tell you differently.

It's very simple on the work-for-hire. It's bad law. It's bad law. I'll do that last just to kind of get to the point, but it's bad law. And you don't have to take my word for it. The Eleventh Circuit has said it's bad law. Nimmer has said it's bad law. Lots of people much smarter than me have said it's bad law. And the rationale, quite frankly, for Supreme Court is remarkably simple.

The second reason is the expense is not satisfied. And then the third is even if the bad test is applied and satisfied, it's rebutted. So they have to get over all these hurdles in order to win their work-for-hire, quite frankly, which is why I think they hired the work-for-hire for Leonard and Grace.

So the expense prong, I'll just be very simple on this. It is in the record. It is in the license agreement and, your Honor, I'm not going to point you to it but I think Tab 1, the $5,000. So the whole crux of the expense prong is who bore the financial risk of the endeavor? Who was on the hook? Who was on the hook for this? And so what we see is under any, you know, accounting, math, or whatever you do, Ruben

Klamer is the only one that never goes negative. He never loses; right? I mean Milton Bradley coughed up the $5,000, gave it to Ruben Klamer, and all these documents are there: We've signed the agreement, we are sending the $5,000. Thank you; I have received the $5,000. Bill Markham, here is the 2400 for your prototype.

But we see all that; and in the license agreement, it's remarkable. It says I am paying you out of the 5,000 I received from Milton Bradley. He simply did not bear any risk. He is the only party that didn't reach into his pockets, the only party. And the only party, quite frankly, that lost on this was Bill Markham because he had to pay -- although he got his costs back -- he had to pay it out of his next royalty check so, quite frankly, he's the one that paid for it.

THE COURT: But he used the $5,000 to pay Markham for creating the prototype; correct?

MR. POLLARO: When he passed -- he got the $5,000 from Milton Bradley.

THE COURT: Right.

MR. POLLARO: And then --

THE COURT: And then he got invoiced from Markham.

MR. POLLARO: Exactly. And again, the contract -- I want to make sure we're crystal clear. The license agreement says I am paying you with the $5,000 I received from --. Okay. I just want to make sure that -- I'm not just saying that. That is what is in the agreement. It say I have received $5,000 from Milton Bradley and of which I am paying you, yeah.

THE COURT: All right.

MR. POLLARO: But again, we don't dispute that. But again, going back to -- your Honor, I don't mean to cut you off. I am trying to hurry a little bit, but the whole crux of that prong of this bad test is who bore the financial risk of the endeavor. And it wasn't Ruben Klamer. It couldn't be. He didn't reach into his pocket. I mean maybe he put the 5,000 in his pocket and pulled it out again, but he didn't reach into his own pocket.

THE COURT: Well, he did when he paid out a portion of the $5,000 to Markham to create the prototype, and theoretically if it costs more money to create the prototype than he had received as an advance, he would have had to pay that out of his own money; right?

MR. POLLARO: Absolutely no evidence of that whatsoever.

THE COURT: Well, I mean it just stands to reason, doesn't it?

MR. POLLARO: If the prototype would have been more than $5,000? Your Honor, I don't think -- he reached -- I'm trying to follow your question. So in the hypothetical, if the prototype was more than $5,000? That's speculation.

THE COURT: Well, but it's also speculation that Markham bore any economic risk.

MR. POLLARO: And just to be clear, and your Honor, I'm glad you brought that up. It doesn't matter. By the way, I shouldn't have thrown that in as an aside because it doesn't matter, by the way, that Bill Markham actually paid for this. It just doesn't matter. It's just kind of an aside.

What matters is who bore the financial risk of the endeavor, and that was Milton Bradley. So I apologize if I confused or threw you off. Don't worry about Bill Markham because it doesn't matter. It's just kind of an extra to say, you know, in fact he's the one that lost. But it doesn't matter. Legally it's irrelevant. The whole analysis is who bore the financial risk of the endeavor, and it was not Ruben Klamer. It simply was not.

THE COURT: Okay.

MR. POLLARO: Now, the agreement to the -- so again, bad law; not met. If for some reason those two hurdles get passed, it's rebutted. They cite no cases that come anywhere close to a reservation of rights. And quite frankly I'm not even sure I understand what their reservation of rights argument is.

All of the cases that talk about this reservation or this instance and expense test say if there's a reservation of rights in the author there is no work-for-hire. And the whole premise of these cases, which by the way -- I have to say this -- only existed for a short period of time. The *Marvel* case has a fantastic summary the first 50 years of the Act, independent contractors out, never work-for-hire, and then the '76 Act you have to actually say this is a work-for-hire, so out after that. So it was literally this window of 10 or 15 years where this silly test was being applied, and almost as soon as it came Congress started changing it. So these cases are just literally an anomaly.

But the whole point is if the author retains -- it's about the intent of the parties at the time of the agreement and so it doesn't matter what -- we could agree that pigs will fly. It doesn't matter if pigs will fly. If I retain the rights to whatever I

assigned you when pigs fly, that's the point. It's not a work-for-hire. That's the whole point. So to the extent I understand it, this idea of when rights -- it doesn't matter. The whole point is the intent of the parties.

And there's the agreement. I don't think there's any dispute about what it says. But I want to get to the actual evidence of what this meant and what it meant to Bill Markham. He said in his deposition in 1989 -- and this was talking about the negotiation with respect to the assignment agreement -- I put in one clause and I insisted on some kind of qualifying clause in there that in case Link Research did not perform as per their agreement with me, the whole game would return to me.

That's what that provision means. That's exactly a reservation of rights. Let them tell you it's not, and we can go from there. But Bill Markham had every intention of reserving the game. And honestly, that's the way he did it. You know, there's testimony in his deposition; he said Listen, I don't design games for any particular company because then I got a dead game if that company doesn't want it. I design stuff that I want to design and I can take it where I want to take it if they don't want it. That

was his MO, and he's got it here.

Just one quick point on the instance and expense, and your Honor probably appreciates this more than me. These are the smart people, by the way, that have said that it's no good anymore. But it hasn't been decided in this circuit, the way I understand it. It's been used, we don't dispute that, it's been used, but it's never been challenged. So as far as we're concerned, our understanding of the law is that has not been decided, and so I'll just leave it as that.

Joint authorship, I think I'm very interested to see what the defense has to say on this, so I could probably do that.

And then the derivative exception, this is going to be interesting. You know, we had very clear testimony from Mr. Orbanes that, you know, I think we went back and forth, like any change, you know, removing a transmission tower could be derivative; you know, any change. And so that doesn't add up when you talk about this analysis that they did. They did this on the derivatives; they looked at the most current version and the prototype. That doesn't make any sense because, as Mr. Orbanes testified, it's a progressive process. Every game is built on the game before it, upon the game before it, upon the game before it. And

so what you have is you can't just look at the differences between the first and the last. You have to look at every one, and Orbanes said that.

And what the cases say is a work or works, so they don't spell it out, but that also makes common sense. If every change -- if any change, removing a transmission tower is not derivative, then you can't just look at the last one that says that it's not there and therefore it's a derivative. You have to look at each version.

THE COURT: But let's say you're right about that and you look at each version and you do it in a progressive fashion. It's not unreasonable to conclude that at some point along the way in a 60-year evolution of a game like this that some of the changes are going to qualify as creative and there is going to be some aspect of derivative work that filters through that 60-year history. Now maybe it's not everything that Hasbro contends, but even so, maybe it's half of the changes are derivative, maybe it's a quarter. Whatever it is, then what do you end up with at the end? I mean it's kind of like you have to kind of follow the chain down, don't you?

MR. POLLARO: I understand. Hypothetically I think that's absolutely right. And so the problem we

have in this case is I've asked multiple times for all the versions -- I haven't gotten them -- for the Game, so, you know, we can't do that analysis. They just haven't turned them over. They can't tell me what they are. I mean -- so it sounds like you'll be hearing about that.

MR. KRUMHOLZ: Yes.

MR. POLLARO: But you're absolutely right, your Honor, and ultimately, if I understand your question correctly is that what you do is you have to look at the starting point, yes, you absolutely do. And so I mean the funny -- the way I understand it, if I understand your question, is you can do the reverse. You can say there are -- let's just hypothetically say you decide we're entitled to terminate some rights for the spec. Let's just hypothetically say that. I don't need to go through every version to determine if I can terminate the spinner in the current version, because I can see this is what I'm entitled to, and I see it there. You see what I'm saying? But you can't do the reverse. You can't say that's derivative, that's derivative, that's -- I mean, sorry, you have to go through each version to determine whether or not it's derivative, and they simply have failed to do that.

THE COURT: Well, I may not understand this

quite right, and all of you will tell me if I don't, but it seems to me there's several ways that you can look at this, and I don't know which one is right. But one way is to compare the current commercial versions to the original and ask the question are there creative changes that make the current commercial versions derivative works? And I think you're saying that's what they are saying, and I'm just --

MR. POLLARO: And that's wrong.

THE COURT: -- so that's one way to look at it.

MR. POLLARO: Yeah.

THE COURT: Another way to look at it is the one you suggest which is, I think, that you have to take every successive version and compare each one to the one before it and determine on a game by game and maybe even a component by component within each game by game version whether the next work is derivative. I think that's kind of what you're saying.

MR. POLLARO: Exactly. But it sounds like, and again I don't want to cut you off, but it sounds like you're making it a little bit too complicated; right? I mean basically at each version you look and see what the delta is, like what's the delta, and then you look at those things and say, okay, that one is derivative of, or there are no deltas, that's not derivative;

right? It's as simple as that; right?

THE COURT: Sure. But there has to be something at the end of all that because other than this boutique gamer site where they sell the old versions, the real money is in the commercial sale of the games, what's out there now selling; right?

MR. POLLARO: Uh'huh.

THE COURT: That's where the money is.

MR. POLLARO: Yeah.

THE COURT: So even if you do what you suggest, there has to be some way to put that all together at the end of the chain and say, okay, what is this thing that's on the shelf? Is it fully a derivative work, or is it partially a derivative work, and how do you get there?

MR. POLLARO: Well --

THE COURT: So that's the second way of doing it. And it seems to me there's like a third way that's sort of maybe in the middle, which is kind of like sort of looking at it holistically in some way, whether something is, you know, whether a work is, the majority of it is new, there's enough new stuff in there that's creative that it becomes a derivative work; you don't have to break it down by component, you don't have to look whether it's the spinner or the track or whatever;

it's just there's enough there to make a derivative work, so it's a derivative work. And I don't really know which of those, if any of them, is the way to do this.

MR. POLLARO: And your Honor, quite frankly, I think I'm a little confused myself. But I think what I'm hearing is I think it's related to the way I said you can do one versus the other, because depending on what you're looking for; right? If you're looking for -- say we got termination rights, and we got termination rights and prototype. Just use that as a hypothetical. I can go to each, any version at any point and figure out, okay, that's out; right? That's the same, that's out, that's out; right?

But if I'm starting from, okay, is this game different, okay, Orbanes testified very clearly that it's a progressive process, every game is built on the one before it. Like they didn't say the new game's based on prototype. They could have said that; right? Then that would be the right analysis. They didn't do that. Orbanes said the opposite, that each game is built on the one before that, and so because of that you have to go through each version.

And again I think ultimately the confusion, if I understand it, again with that caveat, is it depends on

what you're looking at it for. And the point you said about, you know, yes, you can look at the similarities and things like that, that is the other flip side of it for the different reason, more the termination, you know what I mean, that side.

THE COURT: Okay. I think you're at the end of your presentation.

MR. POLLARO: I am, so I'll spare you -- so we believe on the weight of the evidence we win.

And then I do want to say this just very quickly. The Defendants told you last time we met that I believe they used the word *de minimus* and they say, you know, it's not that important, it doesn't matter. It's very important to the Markham parties, extremely important to the Markham parties, and that's why we're here. And I think Linda Mack Ross is just another example of that. She upset her world, you know, she ended up being sick for two weeks after here. She describes it as almost dying with this never heard of a bomb cyclone before.

But it is very important to the Markham parties, and that's why we're here. And if there are attendant benefits that are, that we received because we're here for the right reasons, so be it. But we're here for the right reasons. We're here to stop what happened in

1965, like Bill Markham did, and what's happening today, your Honor.

Thank you, your Honor.

THE COURT: Thank you, Mr. Pollaro.

All right. I think it would make sense to take a break, so let's take a 10-minute break. Let's go off the record for a moment.

(Discussion off the record)

(Recess)

THE COURT: Mr. Krumholz.

MR. KRUMHOLZ: Thank you, your Honor. So I first will be guided by what the Court wants to talk about, but my intention is to make two high-level observations, talk about some of the specific points raised by you, by Mr. Pollaro, and then launch into some of the other items I want to talk about in the PowerPoint and in my outline. So two high-level observations; one is --

THE COURT: Do you have a hard copy of the PowerPoint?

MR. KRUMHOLZ: Yes.

(Pause)

THE COURT: Thank you. Go ahead.

MR. KRUMHOLZ: So first high-level observation is quite candidly there were an extraordinarily large

amount of misstatements of the record and the law that were made during that presentation. I'm going to cover some of them, but I can't cover all of them. One of them I have to waste 30 seconds on, and it is a waste because it doesn't bear on the issues before the Court; but Mr. Pollaro made the statement we did not, Hasbro did not make all versions of the Game available to him. In fact, Mr. Pollaro himself was in a warehouse where every version of the Game was made available to him. He and Mr. Cole physically took pictures of all of those versions and at one point was seeking to admit them into evidence. So, just a patently false statement.

The other high-level observation is since the beginning of this case and to the present they still haven't tried this case for what it is. It is a copyright case. It is not a case about expression -- about ideas, it is not a case about whether Mr. Markham thought that a spinner was a good idea or a circuitous track was a good idea. We dispute that that evidence is credible; but even if we credit it, the issue is did he physically create an expression of an idea, and they have not tried that case from the beginning through now. And we'll talk about that in a little more detail.

So some of the things I want to talk about in particular, just to get them off the table, as it were. There was discussion about the registrations and a representation made we don't dispute that the registrations are wrong. That's not correct.

So the relevance of the registrations could be this, that what is listed in the registrations creates a presumption. It's a rebuttable presumption. So we could have gone into this case and said there is a presumption that Milton Bradley is the author and the owner, based on the registrations. We didn't because we don't really have -- because there's nobody else from Milton Bradley; we didn't have the evidence to support that.

But there is a very logical explanation as to why they registered it in the manner in which they did, which is that Milton Bradley believed that the work done was done as a work-for-hire for it. It asked Mr. Klamer to do something. Mr. Klamer then hired somebody else to do something. It was a -- that's the most logical reason as to why they registered as they did. It's to a large degree neither here nor there because, as I said, we didn't have the evidence to support the presumption, as it were; but I don't want the Court to think that there's an illogic to it.

And just to put a bow on that, the reason that Mr. Klamer or Link was listed as the author for the cover is most likely because it had Mr. Linkletter's picture on it and they were very protective of preserving that right. So there are answers for all that; I just want to make sure the Court is clear about that.

A couple of points raised by Mr. Pollaro. He said if the testimony of Ms. Chambers and Mr. Israel were true, Mr. Klamer would have sought an assignment from the two of them. That's makes no sense under the law because there's no dispute that they were employees of Mr. Markham's company. And I think there is still an open evidentiary question as to whether that was a corporation and who owns their actual rights.

But if we credit the point, if we credit that they worked for Mr. Markham individually, he was their employees (sic), nobody disputes that. Anything they created would have inured to him on a work-for-hire principle. There would be no reason for Mr. Klamer to seek to get anything from them. So that's not inconsistent at all with our position.

They also, Mr. Pollaro also raised the point why would Mr. Markham get a royalty and not Ms. Chambers and Mr. Israel if indeed they contributed. It's the

same answer. That's the life of an employee. What they do is they get a salary, and in exchange for the salary the company gets the fruits of their work. So again, a perfectly logical explanation for that.

A third -- oh, one other thing on the registration which I should point out, and we see this on page 26 of the slide, is they have made this argument in their papers and made the argument again today that Mr. Markham was duped, that he was never told about the registrations; indeed, they say, this is the great vindication that they've come here for to correct the wrong about what was put on the registrations for the copyrights because he was lied to by Milton Bradley and by Mr. Klamer. But he was asked at his deposition in 1989 about this, even though it wasn't relevant to that case. He was asked:

"Do you recall asking" -- and this was referring to Mr. Klamer -- "whether such protection was available?

"Answer: No. I just assumed that the manufacturer would take out the copyrights on it."

So nobody -- and I will say that that reflects a further point, which I'll get to in more detail in a little bit, as to who was acting like the copyright owner. But here he's aware or assumes that Milton

Bradley is going to be taking out copyrights. There is no evidence in the record that he objected to such a thing. There's no evidence in the record that he suggested that that was wrong. He was not acting like he owned the copyrights. And he certainly wasn't duped by anybody, as has been alleged here.

The unfinished board argument, your Honor asked about that. There's two -- so in that 1989 deposition he talks somewhat amorphously about having created an unfinished board or a board game, and I think there are two aspects I think the Court needs to think about with regard to that. One is this: When he was asked to describe how finished it was, at his deposition, he said -- the question: "What was unfinished about the game at the time that you had your discussions with Mr. Klamer?" "Answer: Almost everything."

All right. That's not the whole answer, but that's sum and substance for purposes of this. The reason I raise that is because we're back to the idea versus expression concept. Again, if we want to credit the testimony, the testimony at best establishes that he had some ideas, but there's nothing in there -- if we want to talk about the spinner -- there's nothing in the record to suggest that whatever spinner he planted on there looked anything like the spinner that showed

up in the prototype and showed up in the commercial version which, by the way, looked different between the two of them; right?

So the best we can credit is that he came up with the idea of the spinner, and the best we can credit is that he came up with the idea of the circuitous track. But those are ideas. He needs to have had, he needs to have physically created the expression that shows up in the prototype in order to have a copyright right, and there's zero evidence in the record in that regard.

But we would also submit that there's, that the evidence in the record is clear that those claims are not credible, because if he had done what he said he did, somebody must have known. He must have told somebody; right? But we asked the living people that we could ask about it; right? We not only asked Mr. Israel, and I'll talk about his credibility as we go along, and we not only asked Ms. Chambers, and I'll talk about her credibility as well; but we also asked Ms. Ross, which is their witness that the flew in from Arizona who was close to Mr. Markham. Apparently they had a relationship where it's the kind of thing he would have said to her, because she seemed to idolize him when she was a teenager. All three of them made

clear that they had no idea what we were talking about. Nobody ever said such a thing.

So we don't have the benefit of being able to cross-examine Mr. Markham, which is why we had filed our motion that this testimony shouldn't come in. But the only evidence we have from the actual live witnesses makes his story not credible.

One of the other points raised by Mr. Pollaro was that the declarations from Ms. Chambers and Mr. Israel were I think -- sound nothing like their testimony. I think he used the word "starkly" in describing the difference between the declarations and their testimony, and he kept kind of muttering about the fact that he would show it to you. I'd like to show them to you. They're in their exhibit binder, Tab 20, if the Court will indulge me.

So Tab 20 is JTX56, and it's the declaration of Ms. Chambers, and if we refer to paragraph 5, and I'll read it, she stated in her declaration: "Another artist who was working for the advertising agency at the time, Leonard Israel, also worked on the game project. He and I worked on the game board model, which was based on the ideas and instructions that Mr. Klamer had provided to Mr. Markham. Mr. Israel was responsible for designing the packaging for the game.

While we were working on the project, Mr. Klamer frequently visited the office to oversee the game's progress and approve elements of the design along the way."

I would respectfully submit that that is a hundred percent consonant with her testimony, which obviously elaborated but is entirely consistent with that.

If we go to Tab 21, which is JTX57, that's the declaration of Mr. Israel, and if we go to paragraph 7 in that document here's what he stated in the declaration: "I was responsible for designing the packaging for the game. I would prepare sketches of ideas I had about the different ways the packaging could look. I would then present the sketches to Ruben and Bill and we would discuss them and decide which to use. It was my idea to make the box white. Everyone else thought it should be red, which was the prevailing color for toys at that time. I thought it would make the game stand out from other games on the store shelves."

I respectfully will submit that Mr. Pollaro's characterization is false, that the declarations are entirely consistent with their testimony.

Actually while we have the binder out, they

point to Tab 24 as proof of Mr. Klamer's concession that Mr. Markham, you know, did everything. You had observed earlier that the testimony taken as a whole would suggest that Mr. Markham was very aggressive about preserving his legacy, as he saw it, and that Mr. Klamer was the kind of person that would accommodate that. So it's PTX20 which is at Tab 24, which is a back and forth of letters dated September 4, September 21, and September 24, 1965. The last letter, which is the letter to the publisher that Mr. Pollaro characterized as capitulating the point that Mr. Markham did everything, essentially, and I'll read from that letter. He said: "Although I know what my contribution was in the project, I want to eliminate any hassle with this particular individual because of the annoyance or irritation that could possibly be involved."

I would respectfully submit, again, that piece of evidence is entirely consonant with the observation that your Honor has made with regard to how Mr. Klamer and Mr. Markham interacted with each other.

You also asked about Mr. Markham's skill set, and Mr. Pollaro gave you an answer about Hong Kong and this and that. The honest answer is we have no idea what his skill set was because there's nothing in the

evidence or the record to tell us what his skill set was. And I'm not going to represent that he didn't have skills, but I'm also not going to represent that he did have skills. But this is their burden of proof, and there's no evidence in that regard.

He also, Mr. Pollaro also said that, you know, since 1959 there had been no discussion at all with regard to Ms. Chambers and Mr. Israel playing a role in the creation of the Game. That's a representation that he made. Well, this is Mr. Markham's deposition:

"Question: All right. I think you testified previously that among the people that worked on the Game was Grace Falco Chambers and Leonard Israel?

"Answer: Yes. And my wife."

Mr. Klamer, for his part in the 1989 deposition, which is June 26, 1989, on page 111, lines 4 through 8, says: "With Leonard Israel and Grace Sarreras" (phonetic) -- that was her name, it changed over the years -- "and Bill Markham, I knew their capacity because they worked under the agreement I had with them as an agency for eight or nine years, and I knew graphics would reduce it down to a concrete form."

So indeed, they are mentioned and they were mentioned by the two main people involved here.

You also asked the question, your Honor, about

whether the moment of creation was at the time that the final piece was put in at the restaurant; and we would submit that that is not the time of creation. Both sides agree that rote actions do not constitute creative conduct. They seek to extrapolate beyond what the evidence shows. But the physical act of taking the last piece and plunking it on the track is the quintessential rote act that could not remotely allow one to have the status of author. It was when they had put down, you know, the idea, you know, fully expressed on the board is when it happened, and we don't know exactly what that date was.

You also asked about, well, what happens if the prototype costs were more than $5,000, wouldn't they have to pay that amount, and I'll talk about this a little bit more in my presentation. But I think the answer is off course yes on the record, based on the record and based on the evidence, because the fundamental fact on the expense prong is that it is undisputed that at the outset of the project Mr. Klamer unconditionally agreed to pay the costs. That's where the risk began. The risk began when work was started without knowing whether Milton Bradley would buy the Game; right? And the undisputed evidence from Mr. Klamer is that he unconditionally agreed to pay as

of that time, which was consistent with what he had done with the girls' cosmetic deal which was I think a year earlier. And it was consistent with other projects of the time where he was paying, he was agreeing to run the royalty but also agreeing to unconditionally pay the cost. That's the risk; right? I mean it's --

THE COURT: Well, wouldn't you say that the risk -- so that's one risk, and I think you probably agree the other risk is Milton Bradley decides to take the game and produce it and at that time they're bearing the risk if nobody buys it; right?

MR. KRUMHOLZ: Right, that is their risk kind of down the road. But the quintessential risk, well, first of all it matters greatly the risk between -- so right now we're trying to figure out -- let's back up a little bit.

We're trying to figure out who owns the copyrights before they get transferred to Milton Bradley. Once Milton Bradley gets them and by virtue of the license agreement they're off and running. So we look at, you know, our position has been work-for-hire; right? Work-for-hire, let's look at that to determine who owns the copyrights at that moment. What the law tells us is we look at the

instance and expense test to make that determination; right? So when we look at the expense, the expense is who is bearing the risk; right?

THE COURT: Right, and I'm with you all the way. So your contention is that the only person who is not bearing risk is Markham, and Israel and Falco because those two were employees so they're getting paid by the hour, and Markham is getting paid based on his invoice to Klamer, --

MR. KRUMHOLZ: Right.

THE COURT: -- so there's no risk to that. And I don't think there's any evidence to this, unless he agreed to do it for a fixed price and his expenses might have exceeded that.

MR. KRUMHOLZ: Right. And there's no evidence of that; right? I mean there's always a kind of theoretical risk that, you know, Mr. Klamer goes bankrupt and can't pay.

But in terms of the understanding between them, what the understanding was between them, which is what you look at, there is no dispute in the record as to what that was. It was Mr. Klamer unconditionally agreed to pay the cost; right?

And so what I was trying to get to, and I backed up probably a little too far, is the period of time of

risk between the two of them is the time where somebody begins to do work and the time when a decision is made that actually bears the fruit. So we look at the, you know, the first day of the action by his company up until the moment when Milton Bradley says we're going to give you money. Who bears the risk that that work will be for naught? There's no dispute on the record on that. It is Mr. Klamer, because he has agreed to pay.

The case law that we have cited, and I'll hopefully have time to get to this in the slide deck, is unequivocal on this. Every case where there is a promise to pay the cost has always found that the expense prong is satisfied, regardless of whether there's an additional benefit of a running royalty.

So with that I'd like to back up, if I could, and talk a little bit more about authorship. So I mean the good news is we do have areas of agreement between us. We do agree that they have the burden of proving authorship, that work-for-hires are expressly excluded from Section 304(c), and therefore the only way that they can prove authorship in this case is to prove that Mr. Markham physically created something; that the supplying of ideas, direction, even describing the work is not in and of itself enough to make somebody a

copyright author. They may have other rights. And I'm just going to digress for a second because you had asked about this at the last day of trial, and Mr. Pollaro talked a little bit about this.

The assignment agreement and the license agreement carries with it a bundle of rights. Whatever those rights may be, a very standard practice not just there but everywhere is I don't know what rights you have, I don't need to parse out all the rights you have; but whatever rights you have, you're going to give them to me, whether by license or assignment, so that I know I have all the rights I need to go forward and sell and make this product.

And we know that there were some rights that Mr. Markham had because he and Mr. Klamer together applied for a patent. Now, that's entirely consistent with all the evidence because all the evidence suggests that Mr. Markham played probably a meaningful role in this process and his contributions were ideas and suggestions and direction. That's what you get a patent for. You get a patent for ideas; right?

So whether he -- he might have some trade secret rights, he might have some other rights. The point is that that all -- and Mr. Klamer himself did not only receive Mr. Markham's rights, but presumably had rights

of his own because he contributed ideas. He was an inventor on the patent. All of that got bundled in the license agreement to Hasbro. So it's not a copyright license; right? This license agreement doesn't get terminated, you know, if, even if Mr. Klamer didn't own the copyrights because there's a whole bundle of rights there. So I just want to be clear on that with the Court in case the Court has any concerns about that.

But the last point I want to raise here is not only does Mr. Markham need to have physically created something, but that something that he created needed to be the subject of statutory protection under the 1909 Copyright Act. He's wrong under the law in terms of how that could be created. He said that the only way it could be created is by publication. That's true, that is one way of creating statutory protection; if you published a work with the proper copyright notice under the 1909 Act you do get statutory protection. But the other way is to deposit the materials with the copyright office and get it registered. They're disjunctive; you can do either one. And what the copyright registrations tell us is the materials were deposited. All right. It gives a date, so there's a presumption that that actually happened.

You had asked the question about, well, you

know, kind of what's the status of that deposit material, and here's where we get into a best evidence rule problem I know seldomly invoked, but here I think legitimately invoked because it creates all kinds of problems about not knowing what was actually there.

One thing we know we don't have is a copy of what was deposited. That's the best evidence. And the best evidence rule applies to works like this. I think the *Seiler* case said that, but we've cited the case in our brief.

So we start with what the best evidence is. Go to the copyright office, get a copy of what was deposited, then we know what we're talking about. We don't have that.

Now, in the best evidence rule, 1002 and 1004, you can overcome that, but to overcome that you have to show to the Court's satisfaction that the materials were lost, okay? Well, that's, that shouldn't be that hard to do. You go to the copyright office, you make a request for the deposit materials, and you find out what you get back. You either get back the deposit materials, or they tell you that they don't have them anymore, or they tell you they're not going to give them to you, or whatever. You've done your diligence to find out.

Very, very late in this game, i.e., at the time of their briefing, post-trial briefing, they represent for the first time that they made that effort. Now we've been asking about this all along because we've known this is a problem. We inquired ourselves just to find out what would be involved and, you know, we went no further. But we knew that this was always going to be an issue, and we told them this many times. We put out an interrogatory where we asked them what steps they took. They invoked the privilege.

There is no evidence in the record that they actually made the requisite effort to find out if those materials are lost. And I know, you know, I would assume the Court doesn't want to be deciding this on what may be perceived as a technicality, but this is their obligation, this is their burden, and the evidence is just insufficient; and it does matter, right, because this entire case we've been trying to understand are you saying the prototype was registered and deposited? Are you saying that a commercial version was? Which commercial version was it?

We understand that each of the commercial versions had a 1960 copyright. And Mr. Orbanes certainly testified that with regard to those different versions, unless they were substantially different you

probably were not going to get -- put a new copyright notice on it. But it's also entirely possible that they were derivatives of each other, and that matters when we're trying to figure who, what rights, what is in which. I mean, these things matter.

And it matters for another reason. I honestly still don't have my arms totally around this, your Honor, but here's what they have to prove. The only thing that they've claimed is that Mr. Markham created the prototype. But they do not assert that the prototype was what was statutorily protected. It was some commercial version. It's not reasonably disputed that there are differences between them. We had the testimony from Mr. Orbanes about that.

For them to prevail they have to show what in the prototype Mr. Markham physically created and then show that that also shows up in what was registered and deposited with the copyright office. They can't win their case unless they connect those dots; right? And that's why Mr. Pollaro actually pushed back when you were helping him out a little bit saying, well, didn't he potentially create the spinner? Well, okay, but we don't know whether -- there's no proof of physical creation of the expression that shows up in the statutory version. That's why he said to you no,

Mr. Markham created everything; because unless they can say that Mr. Markham created everything they can't connect the dots. They just can't prove their case. And it is patently absurd to suggest that Mr. Markham created everything.

THE COURT: So let me just make sure I understand this. It seems like an important point. So what we don't -- the problem is we don't know exactly what the prototype looked like; right? There's no evidence that shows us what the prototype looked like.

MR. KRUMHOLZ: Well, we have some photos. We have the imperfect photos of the prototype.

THE COURT: Are those of the actual prototype?

MR. KRUMHOLZ: Yes.

THE COURT: Okay.

MR. KRUMHOLZ: But they -- for instance, we can't see the text on the board.

THE COURT: And what exhibit numbers are those?

MR. GORACKE: JTX509.

MR. KRUMHOLZ: JTX509, Mr. Goracke is saying, yes, and he's given me a thumbs-up.

THE COURT: 509. And then what we have in evidence are the earliest versions of the actual commercial game, which I think the earliest version, I forget what exhibit it is, but I think it was like a

1960 version; right? '60 or '61; I can't remember.

MR. KRUMHOLZ: So there are five versions in the record, all of which have a 1960 copyright notice date, all slightly different from each other. There's nothing in the evidence that tells us which one was first.

THE COURT: All right. So that's part of my question was of those various versions what order, and we don't know the order?

MR. KRUMHOLZ: There's some speculation, but it's no more than that.

THE COURT: All right. So we have these five early versions, they all have the 1960 copyright date, and what you're saying is that there's just no way to know which one of those versions or some other version was the one that was deposited at the copyright office; so there's this missing link in the chain between the photos of the prototype and the earliest versions; right? And that's where we are to start. And so if we assume that, can't I at least look at or do a comparison between the prototype photo and the early versions and do a derivative analysis, a derivative works analysis as to those two?

MR. KRUMHOLZ: Yeah, and that's what we've done. And that's fine as far as it goes on the derivative

side. But it doesn't help them sign the authorship problem, right, because -- so let's kind of even raise this a little higher up.

They're seeking to terminate a transfer. That would be the, whatever is the subject of the assignment agreement as it applies to copyrights. They're saying it's the three copyrights that were registered.

But the only thing that they can terminate is what he physically created that was transferred. He could have -- from a contractual matter, because he owned the work done by Ms. Chambers and Mr. Israel as a matter of copyright law as work-for-hire, so when he transferred -- if he had copyrights to transfer, copyright interest to transfer, he transferred that whole bundle; right? It would have been what they created plus what he created, to the extent they could prove he created something. But the only thing he could claw back is what he physically created because the copyright statute tells us that the work-for-hire contribution does not apply; right? So the only thing that could be the subject of this whole termination action is whatever sliver that Mr. Markham physically created and that he subsequently transferred.

And this is where their case fundamentally falls apart because they want you to look at the documents

and say look at all these documents that show he was an inventor, a designer, whatever, developer; that means that he was the author.

But that hardly means that he physically created anything. An analogy, an example I give is this PowerPoint. I hope you find this PowerPoint useful. I also hope that Mr. Turner, who works for Hasbro, finds it useful, and I hope that he says to me afterwards you did a great job on this PowerPoint. Now, I can volunteer that Ms. Framroze actually created the PowerPoint, or I can take the credit for myself. All those exchanges are no different than Mr. Turner telling me, as the head of the team, that I did a good job on this PowerPoint.

It never gets to the question of whether Mr. Markham physically created anything. So what they have to say is he created everything, as evidenced by the fact that he has this status as inventor, designer, developer. And that is absurd. I'm sorry, but it's completely absurd. It's absurd in part because their own expert says everything was done in six weeks. How in the world is one person getting everything, all this done in six weeks, when they say even everybody working together it's unlikely to get done in six weeks.

It's also absurd because, and I think we showed

this already, because Mr. Markham himself said that other people worked on it. It is also absurd because -- oh, and these are just some examples, but in our brief we talk about all the times in his deposition and documents that Mr. Markham talks about the work that "we" did. He speaks in the plural. He doesn't suggest that he did everything.

And it's also absurd, and we get this, oh, they said, you know, Mr. Israel and Ms. Chambers were mentioned in passing in the invoice. This Slide 10 is a portion of the invoice. They weren't just mentioned in passing. Mr. Klamer paid for six weeks of their full salary for the work that was done on this. He paid for their entire time. The Markham parties sit here and tell this Court that, oh, they only did rote stuff in the part-time. They literally used the word "part-time." Okay. Well, then Mr. Markham committed fraud because he told them that they worked full-time, and Mr. Klamer paid full-time.

So we know beyond doubt that Ms. Chambers and Mr. Israel played a meaningful role here; right? The question then becomes can they show that Mr. Markham did some physical contribution. And you asked the question of Mr. Pollaro where is the evidence that shows that Mr. Markham physically created something?

And there's nothing. There just --

THE COURT: Well, the evidence, I mean the evidence that I get from Plaintiffs' case is that it's two things, may be related; it's documentary, contemporaneous documents in which statements are made that they say reflect what the reality was at the time, which is that he designed, created, and all the words, and it's the, sort of the gaps in the sort of negative inferences that you can draw from the lack of evidence that anyone else did. So the way I get their case is they put these two things together and say, look, there's a lot of documents that say he created everything and there really isn't anything else besides this testimony of Israel and Chambers and Klamer, which they say is completely fabricated and inconsistent, and if you put all of that together there's nothing else to show that anybody else did it and never any documents that said he did it, and that's the theory, I think.

MR. KRUMHOLZ: I agree with all of that. I think that is their theory.

What the documents show is entirely consistent with somebody who played a meaningful role, a meaningful enough role to get a patent, a meaningful enough role to be acknowledged as inventor, designer, developer, and a meaningful role in supervising,

providing input, providing information, providing thoughts, providing direction. I mean what he did is unknowable, you know, 60 years later, but all the evidence suggests that he did play a role and it was a role of that nature. All the documents are a hundred percent consistent with that.

But that's not the question for the Court. The question before the Court is whether he physically created something. And there is nothing -- you know, if he physically created, if he did a sketch, you know, where is it; right? I mean if we want to go with a negative inference, you know, this is his baby, this is the thing that has paid him millions of dollars, and he said out of nowhere, you know, I had this unfinished board; where is the board? I don't have the cite on hand, but in 1989 he said yeah, I think I have some sketches in my attic or in my garage or wherever. Well, where are they? They haven't been produced in this case; right?

There is no -- if we're going to go with the negative inference, this is their burden. They have to show that there was physical creation on his part. And the documents are consistent with somebody who's played a role, but not consistent with or inconsistent with somebody who physically created something. And so then

we look at the other evidence, right, the other contemporaneous documents and testimony, and we have the invoice, as we talked about. We have each of their testimony in 1989. We know that Ms. Israel -- Ms. Chambers and Mr. Israel played a meaningful role, six week full-time. And then we have their testimony; right? And their testimony, right, the Court has already acknowledged this, but their testimony could not have been clearer: "I was assigned to come up with what the box cover should look like." That's Mr. Israel.

And who did the packaging? And then from Ms. Chambers:

"Question: And who did the packaging?

"Answer: Leonard Israel did it."

And from Ms. Chambers, "Question: What role, if any, did Ms. Chambers" -- oh, from Mr. Israel:

"What role, if any, did Ms. Chambers have in connection with the creation of the game board?

"Answer: She put it all together and did the final art work on it."

The question to her:

"Who did the actual hands-on work of building the prototype game board?

"Answer: Well, I did a fair amount of it.

Leonard helped somewhat and whenever he could cause he had other projects that he was working on.

"Question: So just to be clear, you built the houses of the prototype; is that correct?

"Answer: I did, yes.

"Question: Did you build the mountains on the prototype?

"Answer: Yes.

"Question: Did you construct the elevated track physically on the prototype?

"Answer: Yeah, I'm sure. Yeah, it's many years ago, but I do, I do recall working with the different materials and the cardboard and forming it and so on."

So for the Court to conclude anything else, as Mr. Pollaro has said, they really have to -- your Honor has to conclude that they were lying.

And they go through a significant exercise in trying to show inconsistencies to the Court in their testimony to make that case, and this is where frankly things gets a little troubling. Troubling in terms of advocacy because they, for instance, say in finding of fact 99, they state that Mr. Israel did not physically create anything. And below that are the cites that they rely on to have the Court adopt that finding of fact. The first one is Mr. Israel saying that he was

assigned to come up with the box cover and what it should look like. Doesn't seem like it supports that statement.

The next one is just a discussion about what Ms. Chambers did, which is not inconsistent. The next two are what Sue Markham did, not inconsistent. And the last one is the discussion about the fact that Ms. Chambers took the sketches, the art work that Mr. Israel created and did what would indeed be a rote process of enlarging it into a box cover. So we can dismiss that fabrication.

Findings of facts 102 and 103. They claim that Mr. Israel said that Ms. Chambers created the cover, and Chambers said that she did not.

All Mr. Israel said in the cite that they reference is what I just talked about; Ms. Chambers did the physical process of enlarging the art work that was created by Mr. Israel. And then Ms. Chambers truthfully said, to the question of who did the cover, it was Mr. Israel, because the creation of the cover was the art work that he did in the sketch. Nothing inconsistent there.

And then they claim that Mr. Israel and Ms. Chambers performed only routine tasks, and they say both of them. There is not a single cite that

discusses Ms. Chambers at all, but they threw her name in there and asked the Court to adopt that as finding of fact.

And they cite to Mr. Israel's deposition. What Mr. Israel was talking about, and this is in our brief, is his first year on the job. He was not talking about the work that he did. Again, not an accurate representation.

Your Honor asked about this, their claim that Ms. Chambers didn't know what "binding" was, findings of fact 104 through 106. When you go -- first of all, not remembering about binding is hardly a reason to believe that she got up to the Court and lied. But independent of that, when you look at the testimony, she didn't understand the question which came out of the blue from Mr. Pollaro in that context. Asking about binding, she didn't connect the dots. When she was shown the invoice it was clear that there was recognition, saying Oh, you're talking about the binding for the work on the board, sure, that makes sense. So it doesn't even support the proposition that they claim.

Then they have a whole independent finding of fact that says that Mr. Israel and Ms. Chambers didn't know important facts. Again, the cites don't mention

Mr. Israel at all, yet they make that statement. And all they're doing is citing to the binding cite that I talked about above.

And the last one, they claim that it's not clear whether Mr. Israel and Ms. Chambers worked on the prototype. Their entire support for that is Mr. Markham's testimony that he created multiple prototypes, and from that apparently they want the Court to infer that it's not clear that they worked on a prototype. And by the way, with that testimony, to go back to producing the best evidence, where are all those prototypes that Mr. Markham created? What effort have they made to find those and produce those? Because we haven't seen those either.

So I guess in sum, you asked the question is there any reason not to believe them. What is their skin in the game? The answer is they have no skin in the game. I mean we asked them whether they had any skin in the game, and they said they didn't. But we also asked them more particularly, you know, about their relationship with Mr. Markham because maybe they hold a grudge. I mean we affirmatively asked. Mr. Israel said he enjoyed his time working there. Ms. Chambers said, you know, she had good relations with them, it was just time for her to move on.

You know, they had the opportunity to cross-examine these witnesses. They had the opportunity to test out these theories and allow the Court the opportunity to see the demeanor of the witnesses and to see whether, you know, there was any reason to question. They frankly just wasted our time in cross-examination and then come up here with all this nonsense and challenge their integrity.

They talk about this being a legacy issue. Now, none of that matters for the Court, but I would say that there's a great deal of irony in pretending that this is a legacy issue for them when Mr. Markham knew that copyrights were being registered and didn't care. And they actively frankly for no other reason than greed wanted to totally subtract not only Mr. Israel's contribution, not only Ms. Chambers' contribution, but Sue Markham, his own wife's contribution.

They said that the status quo does not change. And again, I'm not going to pretend that this matters for your decision-making, but I think it's just important to get out. The reason they say the status quo does not change is because if the Court somehow rules in their favor, they don't intend to terminate. They intend to go and try to hold this up.

This is not about legacy. This is about

Mrs. Markham, the Plaintiff, who lives in LA, not even showing up to sit in the back of the courtroom about this critical case about her late husband's legacy, can't even come to the courtroom to see what these witnesses have to say, the people that knew her late husband personally.

So with that, I'd like to talk about work-for-hire. So the first question is burden. Who has the burden of proof on the work-for-hire. We certainly acknowledge all the cases they cite stand for the proposition that defendant has the burden of proof on work-for-hire because it's an affirmative defense. But all those cases are infringement cases. That's not what we're dealing with here.

This is a matter of first impression. As far as I know, I think we give one compare cite which does suggest that it's the defendant's burden, but I don't think that issue was addressed with that court; I think they just kind of jumped in.

But we would submit this, that the reason I have the statute up here is this is a statutory claim. You need to satisfy all the elements in the statute in order to prove your claim. One of the elements in the statute clearly is that they have to show that the copyright is other than a copyright in a work-for-hire.

And, in fact, as you'll see in the bottom of this slide they accidentally admit as much in their brief. On page 5 of their memorandum they say: Termination rights under Section 304(c) require that certain conditions be met. Of those conditions, only two are in dispute...The second is that the copyright at issue must not be a copyright in a work made for hire.

They kind of gave it away there because they have that burden. I mean I don't think it matters at the end of the day because I think the evidence is clear on work-for-hire, but it is, I think, a threshold question that the Court is going to need to decide in, you know, whatever written opinion comes out of this.

They also have made the point in their papers, they made the claim in their papers that the instance and expense test does not, does not -- has been abrogated. They don't cite a case for that. They did in the reply cite an Eleventh Circuit case, the *MGB* case that Mr. Pollaro alluded to. That case does not stand for that proposition remotely. It's a 1976 Act case that talks about the Supreme Court case only to talk about it in that context.

But what we do know, and they've acknowledged now after their initial briefing, is that the First Circuit applies the instance and expense test and has

done it on numerous occasions; not just the District Court of Massachusetts, but the First Circuit post-*CCNV* has applied consistently the instance and expense test, and it's clear why. When you look at the opinion from the Supreme Court, it's clear that they're just giving a -- it's a 1976 Act case. They're just giving a historical discussion about the 1909 Act. So I don't think there can be any reasonable doubt that it still applies.

So we have then the application of the test. The instance prong they don't dispute. There's actually nothing in their papers to suggest that they disagree that the instance prong is satisfied. As we have here on Slide 20, the standard is that "'Instance' refers to the extent to which the hiring party provided the impetus for, participated in, or had the power to supervise the creation of the work."

And, you know, the undisputed facts are as you described them, your Honor. Mr. Klamer brought the opportunity to Mr. Markham's company. He was their client. He supervised, instructed, provided parameters, approved the prototype. I don't think -- there is no question because they haven't disputed it.

So the only real issue is whether the expense prong is met, and we've talked about this a little bit.

The standard for that is that under the expense prong, "the focus is not on who bore the costs or expense in physically creating the work itself (the money spent to purchase the paper...the typewriters...the pencils and ink...etc.) Instead, the focus is on who bore the risk of the work's profitability;" right?

So at the risk of repeating myself, we need to look at Mr. Klamer and Mr. Markham and the moment in time when the work was to begin, and the question is who is going to bear the risk that this becomes a profitable endeavor.

THE COURT: So that window runs from the point where Klamer reaches out to Markham and hires him essentially to produce this prototype through to the point where I guess Markham bills Klamer for the work; right?

MR. KRUMHOLZ: I would say there are two points, two end points. I wouldn't say that's the end point.

THE COURT: Okay.

MR. KRUMHOLZ: I would say it arguably -- the first potential end point is when Milton Bradley signs the license agreement and agrees to pay money, because we know some money is now being paid for this work. But I would argue that that's not really the end point because, one, from Mr. Klamer's standpoint he doesn't

know how big the bill is going to be. He doesn't know -- most of that money that they're going to get up front is going to go to the cost. He's, of course, incurred his own expenses; you know, the record talks about him making trips and the like. So whether he ever sees anything beyond his costs, whether he gets a profit is not going to be known until we see whether there are any sales here and how significant the sales are.

So I would say Mr. Klamer's risk really runs through until you start aggregating enough sales to put him out of the red and into the black, and we don't know specifically when that date was. We know that date happened because they made millions of dollars. But his risk period runs until then.

THE COURT: Well, just for terms of doing the expense side of the instance and expense test, you're saying it runs all that way out?

MR. KRUMHOLZ: Well, yes, because I think we -- if we're going to look at the risk between the two of them, it's two different paragraphs; right? What Mr. Klamer has agreed is I'm going to pay all your costs, I'm going to have my own expenses, and I'm taking the risk that this is ultimately going to be sold to Milton Bradley and make enough money beyond

your cost and my cost that I'm going to make a profit.

THE COURT: But doesn't -- I don't mean to interrupt you.

MR. KRUMHOLZ: No, that's okay.

THE COURT: Doesn't that end, as far as at least Markham goes, doesn't that end when they license things to Milton Bradley?

MR. KRUMHOLZ: Well, for Mr. Markham it never began, so it can never end, because he was told at the outset that he would get his costs paid for.

THE COURT: That part I understand.

MR. KRUMHOLZ: Okay.

THE COURT: But in terms of, I mean I'm just trying to figure out, you know, the issue is the creation of the copyrightable thing, --

MR. KRUMHOLZ: Right.

THE COURT: -- and that seems to me that kind of runs from the point of when the, the running up to the point where the prototype is created up to an end point when it's handed off to Milton Bradley, they reach a license agreement and they're off and running.

MR. KRUMHOLZ: So I guess where I'm struggling a little bit, I totally get where you're coming from. We've been trying to figure this out, too. I think we can talk about an abstract block of time for risk. You

were asking or I think what I interpreted you asking is, you know, Mr. Klamer's risk, Mr. Markham's risk.

If we talk about the abstract time of risk, there's no question when it begins. It begins when the first piece of work is done on the project, right, because there's work being done. We don't know the increments.

The abstract time when it ends, that's why I still say it's to, because we know we made some money with this $5,000 advance, but not necessarily enough to cover everybody's cost. So it's mitigating the risk, but it hasn't eliminated the risk of profitability because I'm not making any profit; right?

THE COURT: Klamer did testify that I think he made -- this is your point, I guess -- that he made several trips back to Milton Bradley to consult with them as they were developing the production model --

MR. KRUMHOLZ: Right.

THE COURT: -- and some changes had to be made and whatnot; right?

MR. KRUMHOLZ: Right. I mean frankly we were tempted to go back to see how much it cost to fly TWA back in 1959. It was a lot more expensive, relatively speaking, than today. But we don't have it in the record. We know that there were costs. We don't know

the extent of those costs. But he bore the risk of profitability because until and unless enough games were sold, even with whatever little bit he got left of the advance, he still wasn't in the black. I mean that's --

THE COURT: Let me ask you this. I think I asked you this at the close of the evidence, but I want to make sure that I understand this. So if I decide that this was work made for hire and that both Israel and Chambers were work-for-hire for Markham and Markham was work-for-hire for Klamer, and it encompasses the whole copyrightable block, I mean that's really the end of the case, isn't it?

MR. KRUMHOLZ: Yes.

THE COURT: I mean there's no need to go through the -- I mean there's a need to analyze the documents with respect to that, to the relationship between Klamer and Markham, and they may have relevance to the question of whether it was work-for-hire. But if that's the conclusion, a lot of these factual disputes about who made what and, you know, did Markham create the whole thing, did he do the spinner, did Falco-Chambers and Israel do this piece or that piece, I mean it all doesn't matter.

MR. KRUMHOLZ: Right. That's a hundred percent

correct, and I'll try and put a fine point on that. If the Court concludes that the work done by Mr. Markham, Ms. Chambers and Mr. Israel was all done as a work-for-hire for Mr. Klamer, then we don't care who did what. It doesn't matter. Because if it's a work-for-hire, under 304(c) it's not subject to commission. So yes, you can answer that narrow question and then everything else falls off the table.

THE COURT: Okay.

MR. KRUMHOLZ: A couple of other points on the expense prong. They raised two points; one is the money paid out of a royalty advance, and the other, that there was a running royalty.

On the royalty advance, I mean money is fungible. He could have paid that out of whatever, so I don't think the point really matters. But it also shows, you know, reflects a lack of understanding of the actual risk, because if the actual risk is not as of that day, it's when the work started, and who bore the risk at that time. So it's, to me, a red herring.

As to the running royalty, we have cited some of the cases there, and I think we have others in our brief that make very clear that, yes, a running royalty, as you would expect, is one indicia that maybe there was a shared risk, right, because if you just

have a pure running royalty and you don't get paid but for the success of the product, sure, that's one factor that you need to look at. All of the cases say that that is not dispositive. And, more to the point, what those cases say, and we have cited them, is that if you have a running royalty and you agree to pay costs -- which is something that Mr. Orbanes said is not atypical in this space, particularly when you have to get things done quickly.

If you agree to do both of those things, all the cases that we've seen support that the exception prong is satisfied because -- and again, it's pure logic; right? The fact that you decide to give them extra incentive because we need more creativity here or we need you to work faster is neither here nor there. The question is, you know, what risk did you take and if you were paid. If you're going to be paid regardless, then you didn't take risk. You start looking more like an employee. You start looking more like Ms. Chambers and Mr. Israel; I'm going to get paid for my time, I'm not taking the risk. Sure I'd like to make a lot more money and it's great that you're incentivizing me to do that, you know, work harder and faster, but gosh, I'm not going to get -- I am going to get paid here. So you don't then get rewarded with ownership on top of

that.

THE COURT: I think you're close to being out of time.

MR. KRUMHOLZ: I was afraid of that. So the express agreement -- maybe I'll get awarded little time for derivative after the break.

The express agreement -- I'll skip over collateral agreements. They make the point, well, they make two points. The first is this assignment agreement implies that Mr. Markham must have owned the rights in the first place because he's giving them away. Well, first of all, as we have on Slide 24, and I'm not going to read it for lack of time, but that has been, that concept has been expressly rejected by a number of courts, and we haven't seen a court that says to the contrary. I'm getting confirmation over there.

And again, it makes sense because these kinds of agreements are belt-and-suspenders agreements; whatever you got you're giving to me. But there's nothing here that tells us that he owned copyrights. There's nothing here that tells us that he owned trademarks. We don't know -- and this is kind of a standard agreement.

What they then point to is something that actually works against them. They point specifically

to Section 4 of the assignment agreement, which is a provision concerning application. It says, basically, upon the request of Link Research, Mr. Markham will apply for a copyright, a trademark, or patent. And then what they point to is later on they say if the agreement is terminated whatever they applied for goes back to Mr. Markham, and they say that's kind of the reversion, as it were.

But this provision only actually supports our position because they never asked for a copyright application from him. If anybody thought that a copyright application was necessary from him it would have been because he was the owner and the author, and they would have asked him to do it; but they never did. And we know that this provision was not ignored because they did ask him with regard to a patent and he did comply with regard to a patent. So all this really tells us is the opposite, really. It tells us it's one more indication that he did not believe and did not act like he was a copyright owner.

And this is what I talked about earlier, which is Mr. Markham acknowledging that he knew that copyrights were being applied for and did not act like a copyright owner by objecting.

And they point to this letter or letters back

and forth between Mr. Klamer and his lawyer about whether the prototype was copyrightable and say that that's some evidence of wrongdoing; but it's pretty ambiguous to me. But again, it's the opposite proof. It is Mr. Klamer acting like a copyright owner. He's out there paying his lawyer to find out whether there's a copyright right in this prototype. I doubt he was doing that out of the goodness for his heart for Mr. Markham. It's evidence as to what he believed at the time, which was he owned the prototype interest. And he did this before the assignment agreement, all right? So they can't even point to that.

And we have here two other letters, JTX37 and JTX23, over time of Mr. Klamer again acting like somebody who has a copyright interest. He's on Milton Bradley to make sure that they're doing their copyright notices correctly, that they're renewing properly. He's acting like the guy who has skin in this copyright game, and we see nothing like that from Mr. Markham.

Okay. What do I have left for time?

THE COURT: It depends how much Ms. Glaser is giving you. Let's go off the record.

(Discussion off the record)

MR. KRUMHOLZ: All right. So I will use that

time to talk about the derivative and independent works, and don't let me talk too fast because I could easily do that now.

So we do have agreements on the law. I will start out by saying I think there's a really problematic practice that went on here. They say it's our burden on derivative works.

Paragraph 83 of their amended complaint or third amended complaint, whatever it is, they asked for a declaratory judgment on derivative works as well, and then they put in no evidence. And then we put in evidence on our DJ request, and they say we have a burden. I'm not sure, frankly, how the Court sorts that all out, but it's just really inappropriate to not put in any evidence on something you asked the Court to do; we do it, and then say we have a burden. But that's an area of disagreement.

Areas of agreement is that termination does not apply to pre-termination derivative works. We agree on that. We agree that a derivative work is defined as one or more pre-existing works but adds new, original content. We agree that the degree of creativity in the original contract needs to be -- can be extremely low, and we agree that you need to look at both similarities and differences between the works when doing that

analysis.

Now, there was some discussion about this whole intervening works and whether we needed to look at everything in between. I guess I would make two observations. One I think is consistent with the observation you made, your Honor, which is it doesn't matter. I mean whether it was contributed, whether the particular material was contributed at that moment in time or some prior version, there's no dispute that Mr. Markham didn't play any role -- played no role in those prior versions. The only role he played would have been in the prototype, so where it came along the chain is irrelevant to the analysis from just a logic standpoint.

But also their position is consistent just with the language of the statute. 304(c)(6)(A) tells us that when we're trying to figure out if a work is derivative or not, we look to see whether it's based upon the copyrighted work covered by the terminated grant; right? So we have to go back, and this becomes our problem again of going back, figuring out what Mr. Markham physically created in the prototype, seeing if it's in whatever was deposited with the copyright office that we don't know, and seeing if there's enough similarity that it's based on the prior work, and

looking at the differences to see if there's enough new original work. I mean that's what the statute tells us to do. So I think either by logic or law you end up at the same place.

They have made the argument that by finding that the, I think the 1960 versions are derivative, that results in the loss of authorship for the original author. But that's just wrong as a matter of law. The authorship of the original work carries through into the derivative work and remains the same. There's no limit on that scope. The only difference is that there's a new author for whatever was original that was added, so it's not an argument that is correct in the law.

They also argue that if small changes result in the derivative work it will eviscerate the termination provision itself. I'm not even sure what they're asking of this Court. I mean the law is the law. Congress balanced and decided that derivative works are accepted. The standard for derivative work is clearly established in the law. I don't know if they're somehow asking the Court to apply a different standard, but if they are, I don't know what it is.

And the reality is Mr. Orbanes made clear in his testimony that small changes matter in this business.

They may not in other businesses, I don't know, but we're focused on the facts of this case.

So when we look at -- I'm not going to spend the time to go through all of these, but what we've attempted to do just for the Court's convenience is summarize the differences and the references in the record for those differences between the various versions that we asked the Court to look at.

We asked the Court to look at one 1960 version, and we see there that we have, you know, material differences. I think -- I'm not going to pretend that they are hugely different differences, but they are differences of an aesthetic nature, of a creative nature that were made to create a better product.

I mean you can't reasonably claim that the prototype as created was as aesthetically pleasing and therefore would result in the same amount of sales as the commercial version. They made changes that made it, in their view, better; and given that we're here 60 years arguing about it, they were probably right.

The box cover, the same thing. You know, they used their expertise and experience to say, no, we don't want this shape; we want a different shape. We don't want the logo here; we want it over here. We don't want to just focus on the word "Life;" we want

"The Game of" to be prominent. These are all judgments that experienced people make to improve the chances of success, and it makes it a derivative work.

The same with the rules. The rules, frankly, we were going to say is a completely independent work because they're so different, but at a minimum they're clearly derivative works; I mean just the images themselves. You don't even have to get into any of the words. But the words, basically they did a nice job, as Mr. Orbanes talked about, with their kind of introductory language, and Milton Bradley kept some of their introductory language, so we can call it a derivative work, and that's what Mr. Orbanes testified to. But the differences are material, as we highlight there.

And this is the testimony that I was talking about from Mr. Orbanes about whether these, you know, incremental changes matter, and he testified that these small changes and modifications, as he says, have an overwhelming impact at times. You know, paraphrasing, these are the kinds of changes that are a difference between having a successful product and not having a successful product.

And I don't know if the Court remembers this, but Mr. Carty, on direct, tried to claim that all of

these changes were economic or cost motivated; except at his deposition he had admitted the opposite, that these were aesthetic changes and in fact there typically are aesthetic changes like this made. He completely flipped from his direct examination and acknowledged the truth of the matter, which that these changes are aesthetic changes. And Mr. Orbanes, of course, confirmed that as well.

And Ms. Ross herself, and these are just some of them. We don't even have the color sync here. But Ms. Ross herself, when Ms. Batliner brought a commercial version of the Game, acknowledged 60 years later that it was different than the prototype that she looked at. So the changes were enough that 60 years later she can tell there were differences.

Oh, and this shows up in their brief, and Mr. Pollaro made a little reference to this in his argument. This is a portion of a letter from Mr. Markham to Mr. Taft at Milton Bradley, and it's the so-called "faithful interpretation" letter, and in that last sentence he says, "And I concur. The over-all product is a most faithful interpretation of our mock-up."

Well, I would submit if you use the word "interpretation" you're impliedly saying that there's

creative input. It doesn't say a faithful reproduction. It says "faithful interpretation." So in our view this document only supports the proposition that creative and material changes were made.

You know, I will go really fast through the new version. So what we've been calling the new version is the version presently being sold. And we also looked at a representative third party branded Despicable Me version. And I have to say I don't even need to spend much time because they are so different that I don't know how you can credibly say that they're, frankly, not independent works.

And this really kind of goes to where they don't understand that they're in a copyright case. You know, what they keep coming back to and saying is look, they both have spinners. I know they both have spinners. But the spinners are expressed differently; right? Using a spinner is an idea, a good one, a really good one, but it's an idea. Oh, look, they both have circuitous tracks. Yeah, circuitous tracks existed before The Game of Life, they'll exist -- I don't know when the end of The Game of Life is, but it will presumably exist, if such a thing exists, afterward. But that's an idea. That's not an expression. How you do the circuitous track is what matters. There's no

3-D components on here at all. There's no text on the tracks at all. I mean I could spend an hour-and-a-half going through the differences, but the only similarities are ideas.

And here are some of the differences that I was just talking about. The cover, I mean here's where we're at with these guys. They're saying that an overlap is the use of the trademark The Game of Life. It's not a trademark case. They don't get credit for the fact that Hasbro came up with The Game of Life and is using it, you know, with the trademark. Everything here is different. The only thing that is the same is the franchise and the trademark, The Game of Life.

And here's the Rules. If we go back -- well, I'm not going to use my little time left tying to find that. But these rules look radically different in every respect from the rules that were associated with the prototype.

Despicable Me, I mean, again, yes, we have a spinner. Yes, the -- well, I don't even know if the track would even be considered circuitous at that point, but even if I concede that, the expressions are fundamentally different. I mean it doesn't really matter legally whether it's a derivative work or independent work because we keep getting to do it, but

I think it does matter in this sense. If the Court gets to this part of the case -- which, as we talked about, it doesn't necessarily need to -- the reason we did this is because we would want some guidance. I mean if the Court thinks this is derivative, that affects how we make the next game or the next version because, you know, we're going to make more versions.

In our view, you know, this is so different that it has to be viewed as independent, and we would need -- we would ask, it's not our position to tell you what we need, but we would ask that the Court give us some guidance that this indeed is an independent work so that we can understand going forward that we can do; you know, it just gives us some guidance as to what later versions should look like. The same with the cover.

THE COURT: Okay. I think I'm going cut you off there. So let's just take a very short break and we'll come back and we'll have Ms. Glaser, and then Mr. Pollaro will have his rebuttal.

(Recess)

THE COURT: Ms. Glaser.

MS. GLASER: May I proceed.

THE COURT: You may.

MS. GLASER: Good afternoon, your Honor. I just

want to make a few points because my very able co-counsel, counsel for Hasbro, has done an excellent job dealing with many of the issues.

Your Honor, credit which has generally been given to Mr. Markham does not equate to copyright ownership, which is not true of Mr. Markham and to which Mr. Markham is not entitled.

This case is not -- it's about a lot of things, but it's not about restoring Mr. Markham's legacy. Ruben Klamer has consistently recognized Markham's contributions to the creation of The Game of Life for 60 years, starting when he asked Milton Bradley to credit Markham on the box cover as the Game's designer, and that's in Ruben Klamer's supplemental post-trial proposed findings of fact, your Honor, at paragraph 111.

Instead, this case boils down to the greed of Mr. Markham's second wife, Lorraine Markham, married to him for a year before he passed away and her, in our view, very transparent attempt to bring more money from a relationship that has already been highly remunerative for her and all the parties involved.

To say that Mr. Markham was not the copyright author of this game doesn't tarnish his legacy even slightly; rather, it accurately states the nature of

his contribution to the game under the copyright act of 1909 and controlling case law. Plaintiffs attempts to prove otherwise, in addition to being unsupported by evidence, are nothing more in our view than a cash grab and an attempt to wrongfully steal credit from Mr. Klamer and diminish his contributions to and his financial interest in the Game.

Just as an aside, because we've been talking about this little spinner a couple of times this morning earlier today, I direct your Honor to Footnote 4 of our post-trial reply brief where it's quoting Mr. Klamer's testimony. The spinner, this famous spinner comes from The Checkered Game of Life. It doesn't come from Mr. Markham. It came -- it was picked up and lifted from the prior Checkered Game of Life, and there's no testimony to the contrary.

I want to talk about the First Circuit, not always a comfort area for me because I'm from the Ninth Circuit, but I will tell you that I've read the cases and tried to be as informed as I could be, knowing I'm in front of a First Circuit and not a Ninth Circuit judge. And I'm quoting from the *Forward v. Thorogood* case, 1993. This is after the case that Plaintiffs cite for their authority, and I'm quoting: "Although initially confined to the

traditional employer-employee relationship, the doctrine" -- that's the work-for-hire doctrine -- "has been expanded to include commissioned works created by independent contractors, with courts treating the contractor as an employee and creating a presumption of copyright ownership in the commissioning party at whose "instance and expense" the work was done."

That's the law in the First Circuit as we understand it, your Honor.

I don't know if your Honor has our PowerPoint, but we have a set for you and that happened to be, that particular cite is at page 15 of our PowerPoint.

THE COURT: I don't have that.

MS. GLASER: It's right there.

THE COURT: Thank you.

MS. GLASER: Under the instance and expense test, a court will presume copyright ownership in the commissioning party where instance and expense are both proven. Defendants have shown that the development of the prototype game by Markham and his employees was done at the instance and expense of Link.

The instance portion of the test examines whether the commissioning party was a motivating factor. That's the law. Behind the creation of the work, Plaintiffs appear to have conceded that the Game

was developed at Klamer's instance, in their post-trial briefs. The evidence supports such a finding as well. All the testimony has shown that Mr. Klamer brought the project to Mr. Markham on behalf of Link and not the other way around.

Your Honor, may I approach my little timeline. I would just like to go through it, some of which --

THE COURT: Actually I'll get you a microphone to use so everybody can hear you. We've got a portable.

(Pause)

MS. GLASER: I think I can keep my voice up.

THE COURT: It's important to get it on the digital recording.

MS. GLASER: Sorry. Am I digital?

THE COURT: You're good.

MS. GLASER: I'm going to try not to put my back to your Honor. What we did here is, and some of which has been repeated by your Honor this morning, we start with Mr. Klamer visiting Milton Bradley and is asked to create a hundredth anniversary product. Mr. Klamer sees The Checkered Game of Life in the Bradley archives and is inspired by the term "Life." He pens notes for a family board name, The Game of Life, and considers hiring Bill Markham, among others.

Then you have Mr. Klamer hiring Mr. Markham and his employees on behalf Link on a work-for-hire basis to begin work on the prototype of The Game of Life. In July -- August of '59, Mr. Klamer oversees and directs all work performed by Bill Markham and his employees on the prototype, The Game of Life, including its packaging and instructions.

Mr. Klamer submits a prototype of The Game of Life to Milton Bradley in August of '59. A little later in August Milton Bradley asked Mr. Klamer to make changes to the prototype of The Game of Life to make its production commercially feasible.

Mr. Klamer visits Milton Bradley to help substantially redesign. They haven't made a decision yet to go forward. He goes back to Milton Bradley to help substantially resign the three-dimensionality, the track, the spinner, and other elements of the Game. In September of '59 there's a '59 license agreement between Link and Milton Bradley.

The '59 agreement between -- that's in October of '59. And the '59 agreement between Link and Bill Mr. Markham, doing business as California Product Development. And then in March of 1960 The Game of Life is first published noting Link as the copyright holder on the cover.

In December of 1960 copyright registrations issue for The Game of Life cover as to Link, and the board game and instructions as to Milton Bradley.

From 1960 to 1988 we go forward, everything is operating as it's supposed to. In 1988 there's a copyright registration renewal issued for The Game of Life cover, game board, instructions, listing Milton Bradley as the proprietor of a copyright in a work made for hire; and on July 9, 1989 there's a settlement agreement entered into materially altering Mr. Markham's royalty interest and setting up an escrow account. It goes up; it doesn't go down.

Another factor that courts examine when determining whether a work was created at a party's instance is the extent to which the party had the right to control or supervise the artist's work. All the testimony supports a finding that Mr. Klamer is the one who controlled and supervised the development of the prototype game, not Mr. Markham. Ms. Israel (sic) testified that it was as if Klamer worked at Markham's studios, he was there so much, and Chambers said that Klamer visited twice a week during the development period to check in on their progress and suggest changes or modifications. If you look at slide -- that's on Slides 17 and 18.

If you look at Slide 19, Chambers and Israel both testified that they considered Klamer to be the client and that Klamer had the final say over changes made to the prototype, including when it was ready to be shown to Milton Bradley.

If you go to Slides 20 through 23, your Honor, the expense portion, which has been covered in large part by other counsel, so I'll try to be brief. The expense portion of the instance and expense test looks at who paid for the work. Here the evidence is crystal clear Mr. Klamer promised Mr. Markham that he would reimburse him for all the costs he incurred in developing the prototype game, and Mr. Markham invoiced Link for those costs, and Link paid that invoice. The Game was created at Link's instance and expense.

If you go to 24, Slide 24, ample case law states that work-for-hire can arise where one is paid a royalty. Here, because Markham's costs were already covered by Link, he didn't bear any risk. In fact, because Markham also received an advance against future royalties, Mr. Markham came out ahead. He would and did made a profit whether the Game sold a million copies or it sold zero.

And then the invoice also shows that Mr. Klamer, on behalf of Link, agreed to pay all of Markham's costs

before Link ever received any advance from Milton Bradley. Link would have been on the hook for Markham's costs whether the Game was a success or it was a failure.

And there's nothing -- this 1959 agreement has been raised by just about everybody. There's nothing in the '59 agreement that indicates the parties -- and I urge you to look at Slide 32, your Honor. There's nothing that indicates that the parties didn't intend to create a work-for-hire.

Plaintiffs have claimed that oh, my gosh, look at Section 4 of the agreement, and that's an express, they say, an express reservation of copyrights in Markham. That's rubbish, hogwash; legal terms. Section 4 doesn't contemplate any existing copyrights reverting to Markham. It provides for certain intellectual property rights to revert to Markham if he were to pursue them at Link's request.

I'd like you to go, if you would, to Slide 33, and I'd like to approach one more time with not spending very much time.

THE COURT: Sure.

MS. GLASER: All we're trying to do here is show what the evidence demonstrated is the legal relationship of the parties. You start at the bottom,

and this is based on 17 USC 203(a) and 304(c), which are copyrights created as works made for hire are not subject to termination.

So if you start at the bottom, Ms. Chambers and Mr. Israel are works-for-hire for Bill Markham. They're employees. That's Bill Markham also doing business as California Product Development.

The next arrow up is a work-for-hire that Markham is acting as a work-for-hire, Markham and his company, California Product Development, is a work-for-hire for Mr. Klamer, Link Research and Development.

And then you go up the next level, and they are the licensor, Klamer and Link, to Milton Bradley and Hasbro, the licensee. That is what the evidence establishes in our view, you Honor, of the legal relationship of the parties.

I think if you look at Slide 33 and 34 you'll see that the work-for-hire doctrine applies to work created by employees acting within the scope of their employment. The evidence has shown that all the physical work, all of the physical work of creating a Game of Life prototype was done by Chambers and Israel. There's no evidence, I have to say there's not just evidence -- your Honor asked a couple of questions

about, well, is there some sort of creation moment when you put that last I guess piece of a building on the prototype game. There is not one iota of evidence, to my recollection, and I'll stand corrected if I'm wrong, that Mr. Markham created, actually put that piece on that had anything to do with the actual physical creation of the prototype. This is not just a posse of evidence; there's no evidence.

Now, we know that Ms. Chambers and Mr. Israel were both full-time employees of Mr. Markham and California Product Development at the time they worked on the Game. Both were paid a salary and their paychecks came from California Product Development, not from Mr. Markham personally, and they were both employed as artists. In fact, they were the only full-time artists employed by California Product Development. That's the evidence.

Now, all these contributions for Chambers designing and building the gameboard and for Israel doing the box cover, for which they were very rightfully proud, falls squarely within the scope of their employment. And this District Court, and I'm going to mispronounce this so I apologize, held in the *Foraste v. Brown University*, that the copyrights to works prepared by an employee in the scope of his or

her employment are owned by the employer on a work-for-hire basis.

What does all this mean? And I'm about to sit down. Even if Klamer and Link weren't involved at all, Plaintiffs still would not be able to terminate any great grant of copyrights that Markham owned by virtue of employing Chambers and Israel. That's because works-for-hire are exempted from the termination provisions of the 1976 Act whether the works are made for or by the purported terminating party. In short, our board, Plaintiffs have a double work-for-hire problem and cannot under any circumstances, in our view, terminate any copyrights in or to the Game.

Thank you, your Honor.

THE COURT: Thank you. Ms. Glaser.

All right. So before Mr. Pollaro gives his rebuttal, I have one more question for Mr. Krumholz. It's kind of a weird question. I don't think it probably matters at all, but it just occurs to me it's something I'm curious about. Given that The Game of Life was at least inspired by and maybe even a kind of copy of The Checkered Game of Life, what was the status of The Checkered Game of Life from a copyright point of view in 1960? It was a hundred years old at that time. But my recollection is there are a lot of similarities

between The Checkered Game of Life and the knew game.

MR. KRUMHOLZ: I think the evidence as it stands is it was inspired, but not similar to.

THE COURT: Use the microphone.

MR. KRUMHOLZ: I'm sorry. So the evidence, which comes primarily from Mr. Klamer on this, is that he went in and saw the name and was inspired to come up with the ideas based on the name. But the physical games are very different. So the copyright would have expired regardless, but I would surmise that there would have been not enough similarity in the physical game to say that one was derived from the other even on a copyright basis. I think it was literally a checker-type, you know, based on a checker, a checkerboard.

THE COURT: A checkerboard. Okay.

MR. KRUMHOLZ: Oh, look at that.

THE COURT: I think there was some evidence of it, wasn't there?

MS. GLASER: It's in the record.

MR. KRUMHOLZ: Yes. As a matter of curiosity do you want to see it, your Honor?

THE COURT: No. I just remember there being some evidence.

MR. KRUMHOLZ: Could I at least see if my

description is correct?

THE COURT: Yes.

(Pause)

MR. KRUMHOLZ: Yes, I am now comfortable in my description. It's a checkerboard, essentially, so it was more the name inspired it than the physical game.

THE COURT: Doesn't that also have stages of life in it and life events? Wasn't that part of it?

MR. KRUMHOLZ: I don't know if that -- I don't know that we know that, I guess, is what I would say.

THE COURT: Okay. Maybe I'm imagining that. All right.

MR. POLLARO: It was partly that; I mean it had virtue, and virtues were part of it as well.

MR. KRUMHOLZ: I think that's right. I think it was more of that kind of thing than stages in life.

THE COURT: Well, okay. I told you it was kind of a weird question.

All right. Let's get back to Mr. Pollaro.

MR. POLLARO: Thank you, your Honor. While we're talking about The Checkered Game of Life, I wasn't planning on putting that very high on the list, but that game had a tee total; nothing like a spinner, and it certainly wasn't part of the board game. So Ms. Glaser mentioned that, so I'll just start with

that.

So I do want to just knock out a few of these real quick. I think one of the ones I want to do very quickly is this expense issue. I'm looking at Slide 21 of Mr. Krumholz's presentation. I don't know if you have that available.

THE COURT: I do.

MR. POLLARO: And before I get to my point, I do just want to say there's no evidence of this so-called unconditional promise and, second off, if you look at the law there under *Siegel*, the unconditional promise, if there were one -- I have no idea if they're seeking to enforce an oral agreement or what -- it's related to the gameboard, and under *Siegel*, again, that's irrelevant. We're talking about who is bearing the risk of the work's profitability, and you see the language there. We're not talking about the typewriter, the pencils, the paper, anything like that. We're talking about who is bearing the risk of the success and profitability of this enterprise, and so let me grab my --

THE COURT: I just don't understand how, on what basis you can say Markham bore the risk, as opposed to Klamer. Klamer had a $5,000 up-front royalty payment advance on royalties; right? And Markham billed

Klamer, and Markham was obligated to pay whatever he billed him. Now, it came up under $5,000 for sure, but I don't see -- if Markham's company is getting paid for all the work that they're doing, I don't understand how they're bearing any risk.

MR. POLLARO: Your Honor, it doesn't -- quite frankly, it's irrelevant, and I think I mentioned that before. I think --

THE COURT: You said it was Milton Bradley that's bearing the risk.

MR. POLLARO: And I said kind of as an aside Bill Markham actually paid for it. It doesn't matter. That's not the analysis. You can throw Bill Markham out; it doesn't matter. So let's just ignore Bill Markham for a second and let's focus on the law under *the Siegel* case, and you have to look at who, the focus is on who -- and I'm reading now -- the focus is on who bore the risk of the work's profitability. So we're not talking about the work itself, so let's just forget that for now. We're talking about the profitability of the work, what's going to happen, who's publishing it. Again, that's what this is all about. And so the pencils, the paper, the prototype, doesn't matter.

And so for the expense prong, Bill Markham's name doesn't come up. And so we agree with the law,

it's in I assume Hasbro's --

THE COURT: Why isn't Klamer bearing the risk? I don't understand.

MR. POLLARO: Okay, your Honor. I mean I'm focusing on *Siegel* right now because they're talking about the expense of the prototype, and *Siegel* is telling you that doesn't matter, that's superficial. What we're talking about is why are you even entering into this business? What are you doing with that quote/unquote work? What are you going to do with that prototype? You're going to publish it, and you're going to sell it, and you're going to manufacture it, and you're going to try to make money. Who is bearing that risk? That's what *Siegel* tells us.

THE COURT: Well, more than -- this is in the context of copyright. Milton Bradley doesn't have any skin in the game here until it licenses the Game and then decides to produce it; right?

MR. POLLARO: Exactly. And obviously, based on the timeline, I'm sure you're familiar by now, your Honor, is that happened before the assignment agreement with Bill Markham.

THE COURT: Okay. But I mean so who bore the risk of the works profitability? Break that down.

MR. POLLARO: Milton Bradley.

THE COURT: Well, the work is the thing that's copyrightable, and that has to be the creation, the prototype. That's what you're saying; right?

MR. POLLARO: That's not what I'm saying at all.

THE COURT: Okay. Explain it to me.

MR. POLLARO: *Siegel* says you don't worry about the actual prototype. We'll use our terms. It's saying here the focus is not on the cost or expense in physically creating the work itself.

The work itself in this case is the prototype. *Siegel* is telling us don't worry about that.

THE COURT: Okay.

MR. POLLARO: Don't worry about that. Worry about the next step. Who is going to manufacture it? Who is going to publish? Who is going to have to hire workers on the assembly line? Who is going to have to, you know, buy space on shelves or whatever, however that process works. That's what *Siegel* is telling us, and that's the law, and that's correct.

THE COURT: Well, if that's what it meant, then wouldn't there be a comma and say if somebody decides to commercially produce the work?

MR. POLLARO: Again, we're in copyright law. Under 1909 you don't get copyrights without publishing. And again I'll address that issue that Mr. Krumholz has

repeatedly mentioned, that you can get copyright registration or protection --

THE COURT: Under your theory there could be no work-for-hire for anything prior to the commercial publication of the work; correct?

MR. POLLARO: That's not true at all. That's not true at all.

THE COURT: Okay. Well, then just let's assume that Milton Bradley decided not to buy the Game, --

MR. POLLARO: Okay.

THE COURT: -- all right? So there would still be, I think there would still be a work, wouldn't there, a work that was copyrightable; right?

MR. POLLARO: That's correct.

THE COURT: Okay. And it turns out to be not a very profitable work because nobody is going to produce it; right?

MR. POLLARO: Okay. I'm following your hypothetical.

THE COURT: Okay. So at least theoretically that could be done on a work-for-hire basis. Somebody in that relationship had to bear the risk. It's either, in this case it's either Klamer or Markham bore the risk, because Milton Bradley decides not to even get into this.

MR. POLLARO: I understand your hypothetical, but that's certainly not our facts, and you're talking about a different scenario there. Basically what it sounds like you're doing is you're talking about an agent that maybe just acquires products and then at their own expense goes and figures out what to do with them, maybe they sell them, maybe they don't. That's not even close to what happened here. That's not even remotely close to what happened here.

THE COURT: No, but I'm trying to break this down. It seems to me that you could have more than one entity that bears the risk of a works, a copyrightable works profitability, and on a kind of spectrum of time that the person bearing the risk could be the person that's trying to get the product to market; and then at the point where a company says hey, I'll buy that and I'll produce it, now they're going to bear the risk because they may produce it and incur a lot of costs in doing so and not make money.

MR. POLLARO: I hear what you're saying, your Honor, and there's a couple of problems with that. First of all, the whole point of this instance and expense test is to determine the employer. You can't have multiple parties, so that's out. That's basically what they're doing. And, quite frankly, Mr. Krumholz

started by saying yeah, we wanted to prove it was work-for-hire for Hasbro, but we didn't think we had the evidence and so Plan B was Link. That's exactly the issue. They had to make a choice between do we go with Milton Bradley, who we can't prove had any control, or do we go with Link who had the control but didn't have the expense. That's exactly what happened, which is why they went to this new work-for-hire. That's exactly what happened.

But back to your question. I think, I think, as I understand it, the distinction is simply if I'm Ruben Klamer, let's say, and I'm acquiring products from creators like Bill Markham and I'm acquiring them to sit in my warehouse and I'm going to bear that expense, then that's a work-for-hire. If I just say listen, you know, give it to me, don't worry about it, I'll sort it out, you go your separate way -- because that's really what effectively what a work-for-hire is; right? There's no ongoing relationship. I've paid you, you give me this thing, and we don't even have to see each other again. That's it.

But the situation here is Ruben Klamer is that middleman. He's the guy with the contacts in the industry. And so what he's doing is he is not saying Bill Markham, I will pay you prototype no matter what,

if I don't get any money. He's saying listen, I'm going to find a publisher. If I find a publisher, you, we'll reimburse you for your costs and we'll go from there. And that's what the case law says. So I don't know if that --

THE COURT: So maybe I've missed something in the evidence. You're saying that the deal between Klamer and Markham was that Klamer only had to pay Markham's expenses if Milton Bradley or somebody else bought the Game? I didn't think that that was --

MR. POLLARO: Quite frankly there is no evidence that there was an agreement before, so all we have is the license agreement and the assignment agreement and that license, and we obviously know what those say.

THE COURT: Well, we have some evidence. I mean Klamer at least testified he hired Markham. There's some evidence that they, in fact, they had a business relationship, a historic relationship and their relationship as to this product, and he billed them and -- Markham billed Klamer, and Klamer paid the invoice. I mean that's all evidence; right?

I mean I guess what I'm asking is where is the evidence that says that they had an understanding that Markham wouldn't have to or -- I'm sorry -- that Klamer wouldn't have to pay Markham for the work that

Markham's company did unless and until Milton Bradley or somebody else bought the game? Is there any evidence in the record of that?

MR. POLLARO: No, there's no evidence of an unconditional promise to pay at all, and so I would say there's no evidence of the scenario that you're talking about as well.

THE COURT: Okay. All right. So the evidence is pretty much what I described.

MR. POLLARO: I'm not sure I understand, but I'll move on.

But I do want to direct the Court's attention to Tab 1 in the Markham parties' binder. It should have a blue cover.

THE COURT: In the evidence that you handed up?

MR. POLLARO: Yes.

THE COURT: Okay. I have it.

MR. POLLARO: And if you turn to -- I'm looking at the license agreement. If you'd turn to, it looks like JTX4, 001-004.

THE COURT: Okay.

MR. POLLARO: In the middle of the page there's a section there (3), Manufacture, and I'll just read it briefly as it's relatively short: "Licensee agrees that it will develop, manufacture, sell, exploit and

distribute "The Game of Life" in a diligent, businesslike and aggressive manner, at no expense to Link."

That's what *Siegel* is talking about. That's exactly what *Siegel* is talking about.

THE COURT: Okay.

MR. POLLARO: And I'll mention, too, as well, which may explain how Hasbro was able to turn the license into an assignment. The agreement also contemplates that Milton Bradley will pay for all the expenses and file any copyrights. So they did that themselves.

And make no mistake about it; that's exactly what Hasbro argued today, that by saying that the copyrights that list Hasbro as the owner are somehow correct violates this license agreement. They have nothing but a license agreement, and so I didn't hear an explanation about how that's okay.

I do want to touch on one very important point, and it has to do with this idea that ideas aren't protectable. I think we're all in agreement that that's the case, and in fact that is what patents do. Patents protect ideas. So I think I used this analogy many months ago when we were arguing the summary judgment motions, motions to dismiss; that you and I

don't have to create anything to have a patent together, we can just combine ideas and put our ideas down and file a patent, and you and I would have a patent.

That's not the way copyright works. Copyright, as we've been talking about all day, is about the creation. And so what Mr. Krumholz told you was that Chasen's, you know, the moment that the prototype was created doesn't matter, you know, if anything it's just Markham doing the rote translation of his work of his employees; right? That's basically the argument made, that Markham didn't -- just because he's doing the final creating, it's really the expressions from the other people. And honestly, they've just made the case that the patent, by pointing out the patent that identifies Ruben Klamer and Bill Markham, they've just now told the world that Ruben Klamer apparently was involved in this process, that Leonard and Grace had no ideas, no ideas at all; it was Bill Markham and Ruben Klamer.

So again, going back to the authorship discussion that we had this morning, that rules out everybody else but Bill Markham.

THE COURT: But Israel and Chambers were employees. There's no dispute about that, is there?

MR. POLLARO: Your Honor --

THE COURT: So even if they did have ideas, they belonged to, essentially belonged to Markham, don't they?

MR. POLLARO: Absolutely not, your Honor, and there's a rather large dispute about whether or not they were employees. I'm reading from Ruben Klamer's deposition in this case: Question -- actually I'll give you -- I don't have the exhibit number. I'll just give you the page number and then we can figure out what the exhibit number is. It's Ruben Klamer, May 2nd, page 25 -- I'm sorry -- 44 line 25, to 45 line 5:

"Question: You don't know whether those two individuals were employees or independent contractors for Mr. Markham, do you?"

"Independent contractors."

"Why do you say that?"

"That's what I thought they did."

But yet Ruben Klamer is saying he's an independent contractor. You've got Ruben Klamer seeking an assignment --

THE COURT: Well, that's what Mr. Klamer thought Israel and Chambers were. But Israel and Chambers both said they were employees; right?

MR. POLLARO: The inconsistencies go on and on and on, I get that, your Honor.

The point I'm trying to make is, going back to our conversation this morning about Mr. Klamer seeking Bill Markham's assignments; right? His assignment. He didn't seek an assignment from Leonard or Grace.

THE COURT: Right. But I mean as Mr. Krumholz pointed out, why would he? If they're employees --

MR. POLLARO: They're not employees. That exactly counters his entire argument. Ruben Klamer thought they were independent contractors. And under their version of the law, independent contractors may or may not have their own rights. That's exactly why he should have sought the rights of Leonard and Grace. That's precisely why he should have asked for not just Bill Markham's, Leonard and Grace's, if their version of events is accurate. That's precisely the situation.

THE COURT: Okay. So even if I give you credit for that, what that gets you is that he didn't ask for it; right? I mean, so he didn't ask for that. I mean I guess so what? There's sort of a big so what there.

MR. POLLARO: It's just that the -- well, it's the same situation that we started with. They have to explain away, they have to explain why all the conduct and all the actions that transpired for many years

isn't right; and why the assignment says, you know, Bill Markham, you did this, and the '65 exchange. They have to explain. You know, Bill Markham is a bully somehow? There's nothing in the record on that. By all accounts he was a saint, always had a smile on his face.

They literally have an excuse on how they have to explain and have this Court ignore all the written record. That's what they're doing every time, just trying to confuse things and say that document, yeah, you know, yes, he signed that document but, you know, he only allowed because that was Bill Markham being unreasonable.

You know, out in LA, as you recall, Mr. Klamer had no problem saying, yeah, I wrote that letter to Milton Bradley on August 19th; yeah, I knew it wasn't true; I just said it. So he's either a compulsive liar, or is he lying then, or is he lying now? I mean it's the classic problem.

And, you know, the 1989 deposition testimony. In that deposition testimony Mr. Krumholz said, yes, they did mention Leonard and Grace and said that's one of the reasons why he went to Bill Markham. Well, the relationship with Ruben Klamer and Bill Markham spanned decades before that. Leonard and Grace showed up in

the late fifties; that's one point. But the second point is in that very same deposition repeatedly under oath, said Bill Markham reduced my ideas down to concrete form. Bill Markham. And the same deposition of which he allegedly -- you know, he did say Leonard's and Grace's name. He did, he said it. But when he said who created it, Bill Markham.

That's exactly the problem. Every step of the way they have to come up with an excuse. This is why what is said in this document isn't right. It's more this story that we just told you; yeah, sorry Bill Markham is not here. I mean it's the same song and dance at every turn. They have to explain it away.

I mean Mr. Krumholz just told you that the license or the agreements or -- sorry -- the registrations in this case that list Milton Bradley as owners come from the license. How is that possible? I mean that's not possible. They're not right. And they took it on because Bill Markham was cut out of the conversation. And we've laid that out in our brief, so I don't really want to keep going there.

And just to be clear, I don't know if we put it in our papers, but I think Ruben Klamer continued the distance once Bill Markham died. I think we did put it in our papers. He sent a letter within days of Bill

Markham's death to Lorraine Markham saying do not under any circumstances contact Milton Bradley. And he was doing that because he wanted his face on the box. He wanted to elevate his -- whether it's to minimize Markham or elevate him, it's some combination. And what happened in '65 wouldn't have happened if Bill Markham was here today. So that's the common theme and that's what we keep hearing.

And while we're talking about the time frames, the invoices, they don't match up. The invoice was sent on October 20th. The prototype, as we know, was created -- completed and sent to the attorney by August 14th, so it's literally speculation about when they were working on it and what they were doing. And I'm not going to read the testimony into the record, but I'll identify it. At the trial Leonard and Grace, or actually I'm not sure if this was Leonard or Grace, quite frankly, but I know the substance of the testimony was they spent their time playing the Game. So you want to talk about six weeks? That's a significant amount of time was playing the Game and seeing if there were any issues, and that testimony is 104 line 24 to 105-5.

Just a couple of other issues I'll just knock out real quickly. This CPD business, it was a d/b/a.

There is no corporate entity. It was Bill Markham, Bill Markham alone. There is no corporate, I mean it's a nonissue.

THE COURT: He represented himself as a corporate entity; right?

MR. POLLARO: As a d/b/a corp. He had always had a d/b/a, which --

THE COURT: Okay.

MR. POLLARO: -- my understanding is it has no legal effect whatsoever and that's --

THE COURT: So I'm not sure I'm following what the point of this is, so what's the point?

MR. POLLARO: The point is they keep trying to obfuscate things by saying somehow it's CPD or Markham; we don't know.

It's Bill Markham. There was no company; there was no entity. It was Bill Markham, the individual who was running this enterprise.

THE COURT: Well, whatever his corporate form, he had a company. You don't dispute -- he had a company and had two people, at least, working for him; right? And he also had his wife working for him. That seems undisputed, doesn't it?

MR. POLLARO: Correct. I mentioned it because they keep throwing it out there like it's somehow

relevant, so --.

THE COURT: Okay. Anything else?

MR. POLLARO: One moment, your Honor.

Yes, another; I think this is a quick one. It's the best evidence rule. I'm not even sure I even still understand it because Defendants have, certainly Hasbro has admitted that they went to the copyright office and couldn't get the works, and somehow we should be faulted for -- they say we didn't do it, but looking at Tab 36, I won't bother to bring it to your attention, but we actually told them in an RFA that, yes, in fact, we did go try and get it. So I'm not sure why we're still talking about that issue.

But going back to the authorship issue, I think, following up on conversations from last time, Mr. Krumholz has mentioned that we need to take -- or actually I think this happened out in LA -- a disciplined approach to determine authorship; and that's exactly right. And so the story you've seen has too many holes in it and so this discipline approach is everybody said Bill Markham created it. All the documents are consistent with that. The only thing that's not, that's the testimony we heard about in LA, and that's it.

I do want to talk about the *CCNV* case real

quick. The rationale is very simple. Although that case dealt with the post '76 Act, they were interpreting the term "employee" -- not "employer" like the instance and expense test -- "employee," and the Supreme Court said very clearly if there's no definition in the statute you use common agency principles; you don't come up with a test, you don't come up with a rule; you just do what you've always done. And that's why the commentators picked up on it and that's why employer, the same exact rationale, employees under the 1909 Act. And so, quite frankly, this discussion between circuits, districts or whatever, the Supreme Court came down on that, so that's the law, and whether other jurisdictions don't want to follow it, that's their prerogative, I guess.

And just one quick other point is this idea that I've heard it said several times that somehow Markham could have deposited the prototype. We've been very clear with our positions. First of all, in the categories that these copyright registrations are formed, you simply can't do that. It doesn't fit into that small exception. So we put that in our papers, so suffice to say I'm not going to spend any more time on it; but it's just not correct. There are limited situations where you can do that. That's not in the

registrations we're talking about, that doesn't matter, so it's publication or nothing. And by the time Milton Bradley --

THE COURT: Wait. I'm not sure I understand what you're saying. You're saying that you could not deposit the work with the copyright office?

MR. POLLARO: Could not. You couldn't -- no, you couldn't, because you wouldn't be able to get a registration.

THE COURT: And why was that?

MR. POLLARO: Because in going back to what I said this morning, the general rule -- and I don't even want to call it the general rule. The rule is you have to publish the work and then you deposit what you published in the copyright office. That's the rule. There was a very limited exception that applies to things that don't fit that bill, performances, things like that. It doesn't apply to things that are publishable. And so the Defendants keep making the arguments we could have or should have done something else. That's simply not the case. And I'll spare you me pulling out the copyright compendium, but I can assure you that it's cited in our brief and it tells you exactly that. You can't do that in the categories, specifically in the categories that these registrations

are.

And then secondly on that point, while we're talking about it, again, they seem to fault us for being cut out of the conversation. You know, they cut us out. I mean I've told you about the lie, I've told you about we have the oral lie, in writing, we talked about that with Mr. Klamer and it's in our briefs; but that's perpetuated at every step of the road, and so somehow for them to turn around and disingenuously say we should be faulted because we weren't part of the conversation on the copyrights, that's a problem of their own creation.

I mean Bill Markham was doing everything he should have been doing. These guys behind his back were divvying up his rights. That's what happened. That's what happened. I mean Bill Markham testified very clearly, and they have not responded to it once, you never heard it from them.

He put a clause, Bill Markham put a clause into this agreement that said if Link didn't perform the whole game comes back. That's it. The whole game, the whole -- all of the rights. That's the way Bill Markham operated, and that's the way that some of the later agreements operated. Some did; they had some tweaks. But that's what he said. He testified about

it in his 1989 deposition very clearly. I put that in there so if these guys didn't hold up to their end of the bargain, I would get the game back. And that is a reservation of rights, explain and simple, and that's what the parties understood when they signed that agreement.

THE COURT: Okay. Thanks very much.

MR. KRUMHOLZ: Could I take two minutes to clarify a couple of things on the record.

THE COURT: Okay. Make it quick.

MR. POLLARO: Thank you, your Honor.

THE COURT: Thank you.

(Pause)

MR. KRUMHOLZ: I feel like this is the second deposition transcript I've dropped. So I just want to clarify, your Honor, JTX 3, 4, and 5 are the applications. On the back page of each application it says two copies received December 19, 1960. Our conclusions of law 13 explains that you can in fact submit the deposit copies to get statutory protection. They did, at least on the face of the registration, so I'm not sure what he's talking about.

The other thing is just for the Court's benefit, in terms of the evidence on the payment of cost, you had referenced this. There was a prior agreement,

HTX114, between them where it says explicitly that Mr. Klamer would pay the cost. JTX15 is a virtually contemporaneous agreement dealing with different products and different projects where they said they would pay the cost. And PTX283 is a document almost a year later between them where for the first time they decided to share the cost and they explicitly accepted The Game of Life from that modified agreement.

And also the second day of testimony on page 49, lines 22 through 24:

"Question: Did you owe Markham for his costs whether you did a deal with Milton Bradley or not?

"Answer: Yes, I did."

THE COURT: Okay. Very good.

All right. Thank you. I'm going to get to work on getting an opinion here together. It will probably be hopefully not too long, but at least I would say a couple of months before I get you an opinion; but I'm very confident you'll have it no later than August.

All right. We'll be in recess.

(Adjourned)

C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Denise P. Veitch_
Denise P. Veitch, RPR

May 29, 2018
Date